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OBJECTIVE ASSESSMENT OF HARM IN ORDER TO ESTABLISH COMPENSATION TO THE AGGRIEVED PATIENT

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1. INTRODUCTION

Obtaining healthcare services is a circumstance posing an increased risk of various, often serious and irreversible, non-pecuniary damage to a patient. Requesting healthcare services from a medical institution, patients put themselves at other people's (doctors and other medical staff) disposal and those people's medical activities have direct influence not only on their health but also other personal interests, especially such as dignity, autonomy of the will, or the feeling of safety. Although, at present, the provision of healthcare services is developing in the way that is far from the medical profession's "paternalism", it is necessary to state that patients still are, to some extent, a weaker party in the relations with medical personnel. It is due to the fact that they seek healthcare services or already obtain them when they are ill, disabled or suffering from various pains. This specific circumstance causes that patients subordinate themselves to physicians who provide them with the only possibility of obtaining the desired state of health because, as healthcare services providers, they have knowledge, competence and tools to perform medical activities. Although patients are expected to cooperate with physicians in the course of healthcare services provision, in practice, this cooperation, because of the lack of knowledge necessary to verify the medical procedures applied, is most often limited to passive adaptation to physicians' decisions and recommendations. Even the slightest departure from the established rules of appropriate medical treatment exposes patients to the infringement of their most precious personal values. Various health conditions that require hospitalisation are so extraordinary that any omissions in the process of healthcare services provision may not only worsen the state but also be a factor endangering a patient's life. Therefore, medical personnel are required to do

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their job with special, in fact higher than average, diligence because of the object of their activities, i.e. a person, and consequences that are often irreversible.[1] However, in recent years, the number of legal actions initiated by patients harmed as a result of non-compliance with the rules based on the present medical knowledge as well as medical personnel's failure to be careful enough in the course of healthcare services provision has been rising.

The development of contemporary medical knowledge, more and more modern medical techniques and technologies, any potential irregularities in the provision of healthcare services such as negligence or a lack of good work management, no improvement in competence and update of knowledge by medical personnel, failure to maintain a strict sanitary and hygienic regime in medical institutions or insufficient qualifications of the management and many other circumstances may prove to pose a threat to non-pecuniary values of a patient.

The word "patient" is derived from the Latin word *patiens*, which means "ill", "bearing pains".[2] According to the definition in the dictionary of the Polish language, a patient is "a sick person asking a physician for advice and being under his/her care".[3] On the other hand, the dictionary of foreign words defines a patient as a sick person paying a visit to a physician and being under a physician's care.[4] One can draw a conclusion that a patient is only a person suffering from a particular disease. However, the legislator introduced a definition that treats a patient in a broader sense than just a "sick person". Article 3(1).4 of the Act of 6 November 2008 on patients' rights and the Commissioner for Patients' Rights[5] (hereinafter APR) directly indicates that a patient is a person asking an institution providing healthcare services or a person working in the medical profession for the provision of healthcare services or a person already being provided with such services. A criterion of health or disease is completely omitted. It is especially important nowadays because the only thing which patients often expect asking for healthcare services is the improvement of the quality of their life. They have regular check-ups, need medical consultations, undergo aesthetic surgery, etc. A patient is every person using healthcare services, regardless of the fact whether they are sick or healthy. A woman giving birth to a child in hospital can be an example as she is a patient but, as a rule, is not a sick person.[6]

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[1] Judgement of the Appellate Court in Kraków of 9.03.200, I ACa 124/01, PS 2002, No. 10, with a gloss of approval by M. Nesterowicz, PS 2002, No. 10, p. 130; Supreme Court ruling of 17.10.2002, IV KKN 634/99, OSNKW 2003, No. 3–4, item 33; J. Bujny, *Prawa pacjenta. Między autonomią a paternalizmem* [Patents' rights. Between autonomy and paternalism], Warsaw 2007, p. 112 and literature quoted therein; E. Zielińska (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz* [Act on the professions of a physician and a dentist. Commentary], Warsaw 2014, p. 94.

[2] M. Dercz, T. Rek, *Prawa dziecka jako pacjenta* [Child patient's rights], Warsaw 2003, p. 7.

[3] *Mały słownik języka polskiego* [Small dictionary of the Polish language], E. Sobol (ed.), Warsaw 1995, p. 591.

[4] W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych* [Dictionary of foreign words and expressions], Warsaw 1989.

[5] Journal of Laws [Dz.U.] of 2016, item 186, as amended.

[6] M. Boratyńska, P. Konieczniak, *Prawa pacjenta* [Patients' rights], Warsaw 2001, pp. 12–13.

A few factors are decisive in establishing that given persons are the aggrieved patients: firstly, the fact that the damage was done in a situation when a person asked for the provision of healthcare services or was actually provided them; and secondly, the service was or was to be provided by an institution providing healthcare services or a person who works in the medical profession. The basic definition of healthcare services is laid down in Article 2 (1).10 of the Act on medical activities (hereinafter AMA).[7] In accordance with the regulation, healthcare services are activities serving to maintain, save, restore or improve health, and other medical activities resulting from the process of treatment or from other provisions regulating the rules of performing them. The institution providing healthcare services, on the other hand, is an entity performing medical activities. In accordance with Article 2 (1).5 AMA, it may be divided into a medical entity and medical practice. Article 4 AMA lays down that medical entities are, in particular, independent healthcare institutions, research institutes, foundations and associations the statute of which envisages the performance of medical activities. Medical practice, on the other hand, is individual or group medical practice of doctors and nurses referred to in Article 5 AMA. A person working in the medical profession, in accordance with Article 2 (1).2 AMA, is a person authorised to provide medical services based on other regulations and a person having formal vocational qualifications to provide medical services in a particular scope and medical field. Basic medical professions are of course a physician and a dentist, a nurse and a midwife, a feldsher, a paramedic, a pharmacist or a laboratory diagnostician.

Thus, a person who was harmed in circumstances similar to healthcare services provision but by entities or persons that are not authorised to provide the services and a person who visited patients in a medical entity cannot be granted the status of the aggrieved patient.[8]

A patient, as any other person, has the right to protection of non-pecuniary fundamental values strictly connected with the inherent and inalienable dignity of a human being indicated in Chapter II of the Constitution of the Republic of Poland and Article 23 of the Civil Code. However, due to the circumstances and the nature of healthcare services provision, some of those valuable human interests are especially vulnerable to infringement. These are, in particular, such interests as life, health, dignity, intimacy and privacy. That is why, patients have been given rights, which do not only aim to strengthen the protection of the above-mentioned personal interests but also to raise their position in the field of the protection of other non-pecuniary interests, which are essential in the process of providing them with healthcare services, such as the autonomy of the will or the trust in the system of health protection.

The idea of patients' rights appeared in Poland relatively not long ago. Before 1989, evident medical paternalism could be observed. The relations connected with healthcare services provision were hierarchical, and medical personnel were superior to patients. The introduction of patients' rights was aimed at equipping the group

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[7] Act of 15 April 2011, Journal of Laws [Dz.U.] of 2015, item 618, as amended.

[8] M. Dercz, H. Izdebski, T. Rek, *Dziecko – pacjent i świadczeniobiorca. Poradnik prawny* [A child – a patient and service recipient. Legal guide], Warsaw 2015, pp. 73 and 74.

with the entitlement to exercise those rights and strengthening patients' position, not weakening the physicians' position.[9] The whole catalogue of patients' rights was collected in one legal regulation: Act on patients' rights and the Commissioner for Patients' Rights. The initiative was especially important for the improvement of healthcare services standards as well as the patients' awareness. They could learn what the full scope of their rights and mechanisms of their effective protection were.[10]

Patients' rights include, first of all, the right to healthcare services relevant to the requirements of the contemporary medical knowledge, provided with due diligence, in conditions that conform to professional and sanitary requirements and the rules of professional ethics, and in case of limited possibilities of providing adequate healthcare services, to clear, objective and based on medical criteria procedure of determining access to those services (Articles 6, 7 and 8 APR). In case of endangered health or life, a patient has the right to emergency healthcare services (Article 7 APR). It is also the patients' right to be informed about their health, disease diagnosis, proposed and possible diagnostic and treatment methods, the consequences of their application or non-application that can be envisaged, treatment results and prognosis (Article 9 APR). We can speak about an autonomous entities-patients' wilful entry into a relationship with an entity providing healthcare services or a person working in the medical profession only when they are informed about the scope of the proposed methods of treatment. A broad catalogue of patients' rights also includes the right to expect that information obtained by medical personnel as a result of their work and concerning patients must remain confidential (Article 13 APR). Patients also have the right to get access to medical documents (Article 23 APR) and to expect respect for their private and family life (Articles 33 and 34 APR), and many other rights.

In the course of a complex and complicated process of treatment, a negative interference into the sphere of personality rights and patients' rights may take place, which consists in such conduct of a physician or a medical entity that results in harming a patient. The harm caused as a result of the infringement of medical activities rules means, first of all, physical pain and psychical suffering caused by an injury or health disorder,[11] loss of or decrease in prospects for recovery because of the omission of adequate activities or failure to undertake them in the right time, loss of prospects for health improvement,[12] inconvenience and discomfort resulting from the necessity to agree to numerous procedures, operations or antibiotic therapies aimed at eliminating health-related consequences of the infringement,[13] the unnecessary lengthening of the treatment process, during which the aggrieved felt significant pains, took part in useless rehabilitation that was also connected with physical pain and, in addition,

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[9] D. Karkowska, *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz. II wydanie* [Act on patients' rights and the Commissioner for Patients' Rights. 2nd edition], Warsaw 2012, p. 17.

[10] *Ibid*., p. 21.

[11] M. Nesterowicz, *Prawo medyczne* [Medical law], Toruń 2007, p. 44; and by the same author, *Zadośćuczynienie pieniężne za doznaną krzywdę w „procesach lekarskich"* [Pecuniary compensation for the harm sustained in "medical proceedings"], PiP No. 3, 2005, p. 6.

[12] Supreme Court judgement of 17.6.2009, IV CSK 37/09.

[13] M. Nesterowicz, *Zadośćuczynienie pieniężne…* [Pecuniary compensation...], p. 7.

the lengthened period of their disability,[14] the fear for life and health, the feeling of loneliness in case of being in isolation from relatives resulting from treatment and social uselessness,[15] the feeling of lower self-esteem because of deformation,[16] the necessity to change the former lifestyle, and the loss of trust in people working in the medical profession.[17] The health-related results of a defective operation overlapping the already existing defect may be perceived as a factor increasing patients' feeling of helplessness resulting from inability to perform elementary daily self-care activities, which makes them dependent on care provided by other people.[18]

The legislator, in accordance with the principles determined in the Civil Code, envisaged the possibility of claiming compensation for the harm inflicted by persons whose personal interests have been infringed to be paid to them or alternatively to an indicated charity. The normative grounds for claiming compensation by the aggrieved party are laid down in Articles 445 and 448 of the Civil Code. Based on those regulations, a court may rule an adequate compensation for the harm caused by injury or health disorder (Article 445 Civil Code) or for the infringement of any of the other personality rights (Article 448 Civil Code). A certain difficulty occurred in connection with the patients' non-pecuniary interests safeguards. Courts rightly did not associate personality rights under Article 23 Civil Code with patients' rights laid down in special acts concerning the provision of healthcare services.[19] Non-pecuniary damage that took place as a result of the infringement of patients' rights, which was not the infringement of personality rights at the same time, was not always subject to compensation in accordance with Article 445 and 448 Civil Code. That is why, it was necessary to extend legal grounds for claiming compensation and to create a mechanism that would efficiently safeguard the institution of patients' rights resulting from the fact of being the object of healthcare services. M. Nesterowicz presented such a proposal during the Sejm sub-committee discussion of Article 19a of the Act on healthcare institutions in 1996. The representatives of the Chamber of Physicians and Dentists (Naczelna Rada Lekarska) believed that the introduction of this provision was useless and "unfriendly" towards physicians and that it could worsen the relations between patients and physicians, and lead to litigation in cases that might be resolved out of court. Eventually, it was agreed that it was purposeful and necessary to introduce such a regulation to the Act on healthcare institutions.[20] The amendment of 20 April 1997 to the Act of 30 April 1991 on healthcare institutions[21] added Article 19a(1), in accordance with which patients

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[14] Judgement of the Appellate Court in Łódź of 22.1.2013, I ACa 1018/12.

[15] Supreme Court judgement of 14.12.2010, I PK 95/10, unpublished.

[16] Judgement of the District Court in Bydgoszcz of 19.7.1999, I C 1150/98, with a gloss by M. Nesterowicz, OSP 2002/4/59.

[17] Compare, e.g. the judgement of the Appellate Court in Białystok of 3.06.2016, I ACa 106/16, unpublished; judgement of the Appellate Court in Rzeszów of 5.09.2013, I ACa 251/13, unpublished; judgement of the Appellate Court in Warsaw of 29.08.2006, I ACa 310/06, unpublished.

[18] Supreme Court judgement of 22.06.2005, III CK 392/04, unpublished.

[19] M. Nesterowicz, *Zadośćuczynienie pieniężne…* [Pecuniary compensation...], p. 15.

[20] Gloss by M. Nesterowicz on the Supreme Court judgement of 27.04.2012, V CSK 142/11, OSP 2013, issue 6, p. 436.

[21] Journal of Laws [Dz. U.] No. 91, item 408, as amended.

whose rights have been infringed are entitled to claim compensation for harm under Article 448 Civil Code.

Article 4 APR substituted for the former Article 19a(1) of the now non-binding Act on healthcare institutions. In the presently binding legal state, patients can claim compensation for damage resulting from the infringement of their rights based on this regulation. Its introduction should be assessed as a positive step because in practice it means softening the legislator's rigourism in the field of ruling compensation for non-pecuniary damage only in cases when harm has resulted from the infringement of personality rights.

The opinion that Article 4 APR plays a supplementary role in relation to the basic statutory regulations, which is dominating in jurisprudence and case law, seems to be correct.[22] The scope of application of Article 4 APR to a great extent matches the scope of the regulation under Article 448 Civil Code and partly goes beyond it. Indeed, some of the patients' rights protect human personality rights directly indicated in Article 23 Civil Code. These are in particular such rights as the right to healthcare services, the right to secrecy of information about patients or the right to get respect for their privacy and dignity. Other rights protect the interests resulting directly from the fact of participating in medical relations, e.g. the right to give consent to medical treatment in writing or the right to expect appropriate standard of the services, which cannot be identified with human personality rights. In such a case, the choice of grounds for claiming compensation for harm is the aggrieved patient's decision. A patient has discretion to decide whether the grounds for claiming compensation should be Article 4 APR in conjunction with Article 448 Civil Code or Article 448 Civil Code.[23]

Causing harm that constitutes the grounds for claiming compensation may take place at the stage of diagnosing, therapy and rehabilitation. Although Article 448 Civil Code itself does not prejudice the premises of liability, in accordance with the prevailing approach, not only unlawfulness of an act is required but that act must also be a culpable one.[24] In case of Article 4 APR, however, the legislator's

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[22] M. Safjan, *Kilka refleksji wokół problematyki zadośćuczynienia pieniężnego z tytułu szkody wyrządzonej pacjentom* [Several comments on the issue of pecuniary compensation for harm caused to patients], PiM 1/2005 (18, Vol. 7), p. 8; M. Wałachowska, *Zadośćuczynienie pieniężne za doznaną krzywdę* [Pecuniary compensation for sustained harm], Toruń 2007, p. 315.

[23] M. Safjan, *Kilka refleksji…* [Several comments...], p. 11.

[24] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna* [Liabilities – General part], Warsaw 2016, p. 221; M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code. Commentary. Volume I], Warsaw 2008. p. 1315 ff; M. Safjan, *Nowy kształt instytucji zadośćuczynienia pieniężnego* [A new shape of the conception of pecuniary compensation], [in:] M. Bączyk (ed.), J.A. Piszczek, E. Radomska, M. Wilke, *Księga pamiątkowa ku czci Profesora Leopolda Steckiego* [Jubilee book for Professor Leopold Stecki], Toruń 1997, p. 263 ff; B. Lewaszkiewicz-Petrykowska, *W sprawie wykładni art. 448 k.c.* [On the interpretation of Article 448 Civil Code], PS No. 1, 1997, p. 6 ff; J. Pietrzykowski, *Nowelizacja kodeksu cywilnego z dnia 23 sierpnia 1996 r.* [Amendment of the Civil Code of 23 August 1996], PS No. 3, 1997, p. 3 ff; B. Kordasiewicz, *Cywilnoprawna ochrona prawa do prywatności* [Civil law protection of privacy right], KPP 2000, No. 1, p. 48; A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową* [Compensation for non-pecuniary harm], Bydgoszcz 1999, p. 212; also compare the Supreme Court judgement of 12.12.2002, V CKN 1581/00, OSN 2004, No. 4, item 53; Supreme Court judgement of 15.6.2005, IV CK 805/04, Legalis; Supreme Court judgement 11.12.2013, IV CSK 188/13, Legalis. Different opinion in: G. Bieniek,

will concerning the principle on which liability for a patient's harm should be based does not raise any doubts. The provision lays down *expressis verbis* fault as a condition for ruling compensation.

In case of persons working in the medical professions, the event is most often manifested in the form of culpable conduct, activity or omission departing from guidelines that are binding for the persons on the basis of the current standards of healthcare services, especially when this conduct is in conflict with the principles of the current medical knowledge, available methods and measures of preventing, diagnosing and treating diseases, rules of professional ethics and due diligence. Those unquestionable basic criteria for the way of providing healthcare services are laid down in special statutory regulations concerning particular medical professions, e.g. Article 4 of the Act on the professions of a physician and a dentist,[25] Article 11 of the Act on the professions of a nurse and a midwife,[26] or Article 11 of the Act on the State Medical Rescue Service.[27] On the other hand, the fault of a medical entity consists in failure to fulfil obligations connected with the nature and aim of its activity.[28] Thus, it may be inappropriate organisation of a medical institution, a lack of competent personnel, insufficient qualifications of its personnel, inappropriate conditions for a surgery or treatment as well as other instances of defective management of the process of treatment.[29]

2. SIGNIFICANCE OF OBJECTIVE ASSESSMENT OF A PATIENT'S HARM

One of the elements of a claim for compensation that is most difficult to establish is the determination of the amount of money the aggrieved should be paid. There are no clear criteria laid down in statute. The legislator only indicated that the sum granted for compensation should be "appropriate" to the harm caused. Eventually, courts and law theoreticians made attempts to establish the criteria for determining the amount of money respective to the harm caused. It is commonly approved that in order to determine the amount of compensation on the basis of Article 445 or 448 Civil Code, a court should take into account the size of the non-pecuniary harm, i.e. the level and time of physical and psychical pains,[30] and consider a number of other circumstances that may have an influence on the scope of pains suffered, such as

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[in:] G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia: Zobowiązania* [Commentary on the Civil Code. Book Three: Liabilities], Vol. I, Warsaw 2003, p. 455.

[25] Act of 5 December 1996, Journal of Laws [Dz.U.] of 2015, item 464.

[26] Act of 15 July 2011, Journal of Laws [Dz.U.] of 2014, item 1435.

[27] Act of 8 September 2006, Journal of Laws [Dz.U.] of 2016, item 1868.

[28] B. Lewaszkiewicz-Petrykowska, *Wina jako podstawa odpowiedzialności z tytułu czynów niedozwolonych* [Guilt as the basis of liability for prohibited acts], Studia Prawniczo-Ekonomiczne 1969, p. 132.

[29] M. Nesterowicz, *Prawo medyczne...* [Medical law...], p. 338.

[30] Compare, the Supreme Court ruling of 19.10.1961, II CR 804/60, OSPiKA 1962, No. 6, item 155. Compare also the Supreme Court ruling of 15.12.1965, II PR 280/65, OSNCP 1966, No. 10, item 168.

e.g. irreversibility of the consequences of the infringement, the type of profession, prospects, the feeling of social uselessness, age, gender, life helplessness and other similar factors.[31]

Therefore, it is not sufficient to prove that a given harmful event has really caused consequences in the sphere of non-pecuniary rights and interests of the aggrieved patient. It is also necessary to determine how those consequences have been reflected in the entirety of interests, i.e. to determine the size and intensity of individual physical and psychical pains. The aggrieved is not awarded compensation for the injury or health disorder but for the non-pecuniary damage resulting from it.[32] The physical and psychical pains resulting from the infringement of personality rights decide about ruling compensation as well as its amount. However, the intensity of harm is a phenomenon difficult to measure because it takes place in a person's psyche and depends on his/her sensitivity.[33] Everyone has their own internal attitude towards various phenomena and gives them an individual level of importance. A person's internal hierarchy of highly valued rights translates directly into a different reaction to the negative influence of those values. "For one person truth, beauty and freedom may be at the top of the list and thriftiness, order and tidiness at the bottom; for another person it can be quite the opposite".[34] Individual sensitivity may cause that the consequences of the infringement of the same non-pecuniary right may result in really severe consequences for one person and be quite soft for another.

That is why, when determining the amount of compensation, it is necessary to use an objective method of assessment of the consequences of the infringement of personality rights and other non-pecuniary interests. There were opinions in the past that, while explaining the essence of personality rights, it is necessary to use a subjective concept proposed mainly by S. Grzybowski, who held that personality rights are "individual values from the world of feelings, the state of

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[31] See, the resolution of the full bench of the Supreme Court Civil Chamber of 8.12.1973, III CZP 37/73, OSNC 1974, No. 9, item 145, and the Supreme Court judgements of 15.12.1965, II PR 280/65, OSNCP 1966, No. 10, item 168; of 4.06.1968, I PR 175/68, OSNCP 1969, No. 2, item 37; of 10.10.1967, I CR 224/67, OSNCP 1968, No. 6, item 107; of 13.3.1973, II CR 50/73, unpublished; of 18.12.1975, I CR 862/75, unpublished; of 19.08.1980, IV CR 283/80, OSNCP 1981, No. 5, item 81; of 10.12.1997, III CKN 219/97, unpublished; of 11.7.2000, II CKN 1119/98, unpublished; of 12.10.2000, IV CKN 128/00, unpublished; of 12.09.2002, IV CKN 1266/00,unpublished; of 30.01.2004, I CK 131/03, OSNC 2005, No. 2, item 40; of 28.06.2005, I CK 7/05, unpublished; of 5.12.2006, II PK 102/06, OSNP 2008, No. 1–2, item 11; of 9.11.2007, V CSK 245/06, OSNC-ZD 2008, No. D, item 11; of 17.09.2010, II CSK 94/10, OSNC 2011, No. 4, item 44; of 12.07.2012, I CSK 74/12, unpublished, and of 30.01.2014, III CSK 69/13, unpublished.

[32] Z. Radwański, *Zadośćuczynienie pieniężne za szkodę niemajątkową* [Pecuniary compensation for non-pecuniary harm], Poznańskie Towarzystwo Przyjaciół Nauk. Faculty of History and Social Sciences. Reseach of the committee of social sciences, Volume VII, Book 1, Poznań 1956, p. 173.

[33] J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym* [A model of pecuniary compensation due to non-pecuniary harm under the Civil Code], Warsaw 2010, p. 234.

[34] M. Rokeach, *Beliefs, attitudes and values. A theory of organization and change*, San Francisco, Washington, London 1972, p. 124, citation after: M. Misztal, *Problematyka wartości w socjologii* [The problem of values in sociology], PWN, Warsaw 1980, p. 68.

human psychical life (…). The human feeling, the undisturbed state of psychical life is subject to protection".[35] However, it is necessary to approve of the presently common opinion that when analysing the essence of personality rights and assessing the consequences of their infringement, i.e. when determining the scope of harm suffered, it is necessary to use the objective criterion referring to opinions adopted in the society.[36] The objective criterion for the assessment of the harm caused consists, as a rule, in taking into consideration only rational reactions of the aggrieved to the given damage to his or her non-pecuniary rights and interests. Thus, in this scope, individual systems of values of members of the community play a significant role in the process of developing legal protection of a person's personality rights. Determining the structure of importance of different personality rights, they also make it possible to explain and predict most frequent human reactions to their infringement. Thanks to that, it is possible to determine what a person's "normal" sensitivity and "typical" reaction to the infringement of the right are, and then to adopt those criteria as a starting point for the assessment of the scope of harm the aggrieved party has sustained.

Indeed, it turns out that there is no infringement of personality rights when the hardship caused to another person, in accordance with the opinions that are common in the community, is the hardship of little significance, i.e. does not exceed the threshold from which the infringement of personality rights starts.

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[35] S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego* [Protection of personality rights under general provisions of civil law], Warsaw 1957, p. 78; by the same author, [in:] W. Czachórski (ed.), *System prawa cywilnego, t. I, Część ogólna* [Civil law system, Vol. I, General Part], Ossolineum 1974, p. 297. Also A. Wolter, *Prawo cywilne* [Civil law], Warsaw 1986, p. 178; similar opinions were expressed in the judicature in the Supreme Court judgements of 19.09.1968, II CR 291/68, OSN 1969, No. 11, item 200, with a gloss by A. Kędzierska-Cieślak, PiP No. 5, 1970, p. 818 ff; of 12.07.1968, I CR 252/68, OSN 1970, No.1, item 18, with a gloss by A. Kędzierska-Cieślak, PiP No. 8–9, 1970, p. 417 ff.

[36] Compare, inter alia, A. Szpunar, *Ochrona dóbr osobistych* [Protection of personality rights], Warsaw 1979, p. 107; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych* [Pecuniary protection of personality rights], Warsaw 1975, p. 29; J.S. Piątkowski, *Ewolucja ochrony dóbr osobistych* [Development of protection of personality rights], ZN IBPS 1983, p. 20 ff; A. Cisek, *Dobra osobiste i ich niemajątkowa ochrona w kodeksie cywilnym* [Personality rights and their non-pecuniary protection in the Civil Code], Wrocław 1989, p. 39; by the same author, [in:] E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Warsaw 2011, p. 56; P. Machnikowski, [in:] E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary] Warsaw 2014, p. 59; S. Dmowski, [in:] S. Dmowski, S. Rudnicki, (eds), *Komentarz do kodeksu cywilnego* [Commentary on the Civil Code], Warsaw 2009, p. 108; S. Rudnicki, *Ochrona dóbr osobistych na podstawie art. 23 i 24 k.c. w orzecznictwie Sądu Najwyższego w latach 1985–1991* [Protection of personality rights under Articles 23 and 24 Civil Code in the Supreme Court judgements in the years 1985–1991], Przegląd Sądowy 1992, p. 34; In the judicature, compare, inter alia, the Supreme Court judgement of 16.01.1976, II CR 692/75, OSN 1976, No. 11, item 251 with a gloss of approval of the rule by J.S. Piątowski, NP. 1977, No. 7–8, p. 1144 ff; Supreme Court judgement of 25.04.1989, I CR 143/89, OSP 1990, No. 9, item 330 with a gloss of approval of the rule by A. Szpunar; judgement of the Appellate Court in Kraków of 13.12.1991, I ACr 363/91, OSA in Kraków, year I, Bielsko-Biała 1993, item 62, p. 218; judgement of the Appellate Court in Łódź of 28.08.1996, I ACr 341/96, OSA 1997, No. 7–8, item 43 with a gloss by T. Grzeszak, MoP No. 8, 1997, p. 318; Supreme Court judgement of 11.03.1997, II CKN 33/97, OSN 1997, No. 6–7, item 93; of 23.05.2002, IV CKN 1076/00, OSN 2003, No. 9, item 121; Supreme Court judgement of 28.02.2003, V CK 308/02, OSN 2004, No. 5, item 82.

The level of distress suffered by the aggrieved party is important when it exceeds that threshold.[37] Thus, the scope of the harm sustained cannot be insignificant. Insignificance of harm is one of the reasons why courts refuse to rule compensation, which the representatives of jurisprudence and the judicature do not question.[38] Compensation for non-pecuniary damage is not an obligatory ruling but an optional decision.[39] The principle of optionality results from the phrase used by the legislator in Articles 445 and 448 Civil Code: "a court may rule".[40] The discretion to adjudicate on compensation in a given case is called "a court's right". That is why, meeting the criteria for liability for harm caused does not result in a patient's disposal of a claim because this depends on a discrete, to some extent, decision of a court. Optionality of ruling compensation means that a court has the right to assess whether, in a particular case, there are sufficient circumstances meeting the criteria for the refusal of compensation. Consistently, the legislator maintained the rule in the content of Article 4 APR.

At the same time, what is rightly noticed in the literature, being a member of the community and functioning in it is necessarily connected with some kind of mutual interference into the sphere of broadly understood personality rights.[41] It is assumed that until the interference is insignificant and does not exceed a certain threshold acceptable in our culture, no one should speak about harm.[42] It seems that the circumstance of taking part in the relations resulting from the provision of healthcare services is rich in situations when we deal with such interference. For instance, calling patients out loud in the waiting room with the use of their names, which is a common practice, is such unlawful interference. Also patients' short visits to physicians with the surgery door left open infringe their right to get respect for their intimacy and dignity. It seems, however, that the recognition of some activities within the limits of conventional interference as not causing harm results not only from rational assessment but also from the fact that such interference is necessary for more efficient functioning in the community.

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[37] M. Pazdan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code. Commentary. Volume I], Warsaw 2013, p. 94; by the same author, [in:] M. Safjan (ed.), *System prawa prywatnego. Prawo cywilne – część ogólna* [Private law system. Civil law – General Part], Warsaw 2012, p. 1234; P. Nazaruk, [in:] J. Ciszewski (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Warsaw 2014, p. 59.

[38] P. Granecki, *Odpowiedzialność sprawcy szkody niemajątkowej na podstawie art. 448 k.c.* [Responsibility of a perpetrator of a non-pecuniary harm under Article 448 Civil Code], p. 109; J. Jastrzębski, *Kilka uwag o naprawieniu szkody niemajątkowej* [Comments on repairing the non-pecuniary damage], Palestra issue 3–4, 2005, p. 42.

[39] Supreme Court judgement of 15.12.1999, III CKN 339/98, OSP 4/2000, item 66, however compare the Supreme Court judgement of 19.10.2011, II CSK 721/10, Legalis; Constitutional Tribunal judgement of 7.02.2005, SK 49/03, OTK-A 2005, No. 2, item 13.

[40] Supreme Court judgement of 12.05.1951, C 646/50, Zb. Urz. item 22/52; *ibid.*, resolution of seven judges of 15.12.1951, C 15/51, Zb. Urz. item 3/53; Supreme Court judgement of 15.05.1951, C 109/51, Zb. Urz. item 23/52; Supreme Court judgement of 21.04.1951, C 25/51, Zb. Urz. item 43/52; Supreme Court judgement of 30.06.1951, C 649/50, Zb. Urz. item 44/52.

[41] P. Machnikowski, [in:] E. Gniewek (ed.), P. Machnikowski, *Kodeks cywilny. Komentarz. VI wydanie* [Civil Code. Commentary. 6th edition], Warsaw 2014, p. 63.

[42] *Ibid*.

The objective conception of the assessment of infringement consequences assumes evident significance in relation to such personality rights, especially important to a patient, as dignity, honour, bodily integrity, good reputation, the right to privacy or the freedom of conscience where the assessment of infringement is most often made through the prism of subjective psychical feelings of the aggrieved party. To give an example of reference made by a court to objective rules of assessing the level of consequences of the infringement of non-pecuniary interests, one can present a case heard by the Appellate Court in Kraków,[43] in which a patient sued a hospital and requested that it should make a specified declaration and pay a compensation for harm sustained as a result of giving an unauthorised third person access to medical documents. However, the court held that, objectively, giving another physician, a professor of medical sciences, access to medical documents for the purpose of consultation, even in the event of the infringement of APR in the form of insufficient protection of personal data, is not related to the common feeling of the breach of medical secrecy in the way that violates personality rights. Although the court stated that the defendant undoubtedly was not authorised to give access to the entire documents (with the patient's personal data), such an activity does not automatically constitute the infringement of the patient's personality rights. In this case, indeed, the data protected were given to a specialist physician, and the fact that another physician learns about the course of complicated childbirth, in objective social assessment, does not harm feelings and is not deemed to be interference into privacy. Moreover, there is no risk of making the obtained information public because the other physician is also obliged to comply with the rules of professional confidentiality and medical ethics.

The assessment whether personality rights have been infringed and to what extent cannot be made on the basis of individual sensitivity of the party concerned but on objective social reaction[44] and, moreover, with the opinions in the community and not the social reaction to the defendant's given conduct taken into consideration.[45] The application of the objective conception is of special importance as, on the one hand, it makes it possible to eliminate pathological oversensitivity of the aggrieved that usually exists still before sustaining harm[46] and, on the other hand, to dismiss an action of the barraters, excessively litigious, oversensitive men.[47] Although patients' awareness of the scope of their rights in connection with healthcare services provision is still very low in Poland, its evident growth can be observed nowadays. Inter alia, the institution of the Commissioner for Patients' Rights and propagation of the rights by the media contribute to that. This creates a threat that in the future, patients will become more and more demanding not only in relation to physicians but also the whole healthcare system. It can directly translate into multiplicity of litigations because

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[43] Judgement of the Appellate Court in Kraków of 3.09.2015, I ACa 679/15.

[44] Supreme Court judgement of 16.01.1976, II CR 692/75, OSNCP 1976, No. 11, item 251, with a gloss by J.S. Piątowski, NP 1977, No. 7–8, p. 1144.

[45] Supreme Court judgement of 29.09.2010, V CSK 19/10, OSN 2011, No. B, item 37.

[46] A. Śmieja, [in:] A. Olejniczak (ed.), *System prawa prywatnego. Prawo zobowiązań – część ogólna. Tom 6, wydanie II* [Private law system. Liability law – General Part, 6th Volume, 2nd edition], Warsaw 2014, p. 736.

[47] P. Nazaruk, [in:] J. Ciszewski (ed.), *Kodeks cywilny. Komentarz. Wydanie II* [Civil Code. Commentary, 2nd edition], Warsaw 2014, p. 60.

of seeming harms sustained as a result of even minor hardships resulting from the treatment process. The assessment of the size of harm with the use of objective criteria is to counteract such threats. On the other hand, an objective assessment of harm makes it possible to notice the suffering of people who, because of their incomplete intellectual development connected with age or mental condition, cannot properly assess or express the scope of harm they sustain as well as the situation in which they are.[48] In case of the aggrieved patients, it is especially evident in relation to the prenatal damage and situations when, due to inappropriate treatment, the harmed person is in the state of cerebral coma, i.e. in the "vegetative" state. It can be even said that the objective way of assessing the consequences of infringements is in particular frequently applied to assess patients' harm.

2.1. COMPENSATION AWARDED TO THE AGGRIEVED PATIENTS IN CEREBRAL COMA

The present development of medicine allows people with permanent damage to their brain resulting in coma to be kept alive for many years. At the same time, inappropriate medical conduct, most often in the course of surgeries performed under general anaesthesia, leads to inflicting such consequences. General anaesthesia eliminates consciousness of a patient and perception of pain controlled by physicians and other medical personnel. The physicians and special devices must monitor basic living functions of the patient's organism (blood circulation, respiration). Many surgeries can only be performed under general anaesthesia. However, it is a state that poses many threats to the body. There are many factors behind that, e.g. age or weight. Many serious complications may take place during general anaesthesia; these can be circulatory or respiratory collapse, anaphylaxis due to anaesthetic agents, vomiting and passage of gastric content to the respiratory tract, embolism, etc. That is why, based on the contemporary medical knowledge and due diligence required from medical personnel, all possible surgeries on a patient in the state of general anaesthesia are expected to be performed with the highest conscientiousness and carefulness. Indeed, it quite often happens that during the provision of healthcare services in the form of a surgical operation performed under general anaesthesia, there are situations when the surgical intervention is successfully performed and in compliance with medicinal art, however, the omission of appropriate care after the operation, still before the patient is woken up, may lead to circulatory and respiratory collapse, and as a result to cerebral coma.[49]

Such a person undoubtedly is the aggrieved because he or she sustains persistent damage to health as a result of culpable inappropriate medical procedure. There is a question, however, whether an unconscious person who cannot feel actual harm should be awarded compensation and, if so, in what amount. Case law in

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[48] M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code. Commentary. Volume I], Warsaw 2008, pp. 1436–1437.

[49] A. Kubler (ed.), 3rd Polish edition of *Anestezjologia. Tom I* [Anaesthesiology. Volume I], Wrocław 2010, p. 699.

Poland as well as in many European countries (Germany, England, France) seems to be established. Courts unanimously hold that such people should be awarded damages.[50] It is worth emphasising that in French jurisprudence, there are also different opinions. Opponents of awarding compensation in such circumstances believe that the necessary requirement for damages is the aggrieved person's consciousness. Since such people cannot feel the harm, only their needs, i.e. costs of hospitalisation, should be compensated.[51] According to the supporters of awarding compensation to people in cerebral coma, any harm, regardless of the state in which the aggrieved is, should be awarded damages. On the other hand, refusal to award them would be unfair and it would favour perpetrators and their insurers, while the aggrieved would actually remain deprived of happiness and life pleasures.[52]

The issue was solved in the Supreme Court ruling of 16 April 2015.[53] The plaintiff, being a car passenger, was injured in an accident. Her loss of health was calculated and quoted at 230%. Since the accident, she has been in the vegetative state. All the three court instances had no doubts in this case. The lack of possibility of feeling the harm cannot deprive the plaintiff of compensation. The liability of the perpetrator and the insurer was unquestionable. The problem was what amount of compensation should be awarded. The district court ruled PLN 250,000 in damages. The appellate court, emphasising the application of objective criteria in the analysis of the essence of personality rights, stated that the compensation ruled by the court of first instance was inadequately low in relation to the harm sustained and raised the amount to PLN 500,000. Next, the Supreme Court once again raised damages to PLN 700,000. The Court rightly emphasised that: "The right to compensation does not depend on the possibility of assessing the extent of the harm by the aggrieved party and the possibility of getting to know how the person feels the harm. On the basis of objective criteria for the assessment of the extent of harm, in case the conditions under Article 445 §1 Civil Code are met, it is possible to award adequate compensation to persons who, because of the age or psychical state, are not aware of the harm sustained and cannot assess its extent". This attitude of the Supreme Court should be absolutely approved of.

The defendants in such cases usually refer to the circumstance that since compensation aims to first of all soothe the physical and psychical pains, the person in cerebral coma who does not feel such pains is not entitled to damages. However,

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[50] See, M. Nesterowicz, *Prawo medyczne. Komentarze i glosy do orzeczeń sądowych. Wydanie II,* [Medical law. Commentaries and glosses on court judgements, 2nd edition], Warsaw 2014, p. 484; by the same author, *Zadośćuczynienie pieniężne na rzecz poszkodowanych w stanie wegetatywnym na skutek śpiączki mózgowej (na tle wyroku Sądu Najwyższego z 16.04.2015 r., I CSK 434/14)* [Pecuniary compensation for the aggrieved in the vegetative state as a result of cerebral coma (in the light of the Supreme Court judgement of 16 April 2015, ICSK 434/14)], Przegląd Sądowy No. 6, 2016, p. 28 and Polish and foreign case law referred to therein; M. Wałachowska, *Zadośćuczynienie pieniężne...* [Pecuniary compensation...], p. 40, 69 ff, 93 ff and foreign case law referred to therein.

[51] See, R. Barrot, *Le dommage corporel et sa compensation,* Litec 1988, p. 385, citation after: M. Wałachowska, *Zadośćuczynienie pieniężne…* [Pecuniary compensation...], p. 70.

[52] M. Nesterowicz, *Zadośćuczynienie pieniężne na rzecz poszkodowanych…* [Pecuniary compensation for the aggrieved...], p. 29 and French literature listed therein; M. Wałachowska, *Zadośćuczynienie pieniężne...* [Pecuniary compensation...], p. 70.

[53] I CSK 434/14, LEX No. 1712803.

the harm sustained is real; the persons lost an opportunity to live a normal life and the lack of physical and psychical fitness deprived them of the possibility of professional development, having a family or enjoying all life pleasures. That is why, they are entitled to compensation.[54]

2.2. COMPENSATION TO PATIENTS HARMED IN THE PRENATAL PERIOD

Straight at the beginning of the discussion of this issue, it is worth emphasising that a human being in the prenatal phase of life is subject to special protection.[55] First of all, he has the fundamental right to health and life protection referred to in Articles 38 and 68(1) of the Constitution of the Republic of Poland. Such an interest as life is subject to constitutional protection at every stage of development, thus also in the prenatal period. That is why, also the entitlement to the legal protection of health in this period is unlimited.[56] On the other hand, the legal protection of health of the conceived human being is implemented by the right to healthcare services in this period. The legal definition of a patient laid down in the provisions of the Act on patients' rights, in fact, does not directly indicate that the term also covers a foetus, however, the Act lists various groups of patients, including minors, which is aimed at regulating the rights of children. On the other hand, in accordance with the definition laid down in Article 2(1) of the Act on the Children's Ombudsman,[57] a child is any human being from the moment of conception to the age of majority. Therefore, it is rightly emphasised in the literature that there are no obstacles to assume that the definition also covers the period of prenatal development.[58] Consequently, there should be no doubts that a foetus, in the period when the mother is provided pregnancy-related care, should be treated as a patient and as such may also become aggrieved as a result of the process of treatment. The foetus is also provided healthcare services not only indirectly through the care for the pregnant mother but also directly in the course of surgical treatment performed on him/her in the mother's womb thanks to the advanced medical techniques.

Although civil law does not equip a conceived child with legal capacity, in case someone's conduct, activity or omission causes harm to him/her, when he/she is born, he/she may claim redress to the harm sustained before birth based on

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[54] See, M. Nesterowicz, *Prawo medyczne. Komentarze i glosy…* [Medical law. Commentaries and glosses...], p. 484 ff; *ibid*., *Zadośćuczynienie pieniężne na rzecz…* [Pecuniary compensation for the aggrieved...], p. 21 ff. M. Wałachowska, *Zadośćuczynienie pieniężne...* [Pecuniary compensation...], pp. 40, 69 ff, 93 ff.

[55] More on this issue in: D. Karkowska, *Prawa pacjenta, wyd. II* [Patients' rights, 2nd edition], Warsaw 2009, pp. 100–101.

[56] Constitutional Tribunal ruling of 28 May 1997, K 26/96.

[57] Act of 6 January 2000 on the Children's Ombudsman (Journal of Laws [Dz.U.] No. 6, item 69, as amended).

[58] J. Ciszewski, *Prawa pacjenta w aspekcie odpowiedzialności lekarza za niektóre szkody medyczne*, [Patents' rights in the light of doctor's responsibility for some medical harm], Gdańsk 2002, p. 13 ff; D. Karkowska, *Ustawa o prawach pacjenta…* [Act on patients' rights...], p. 77.

Article 446[1] Civil Code. With the use of this regulation, the legislator protects the future interests of the conceived child. Therefore, the necessary requirement for their implementation is his/her live birth. Thus, if defectively undertaken activities of the medical personnel in relation to the provision of healthcare services in the prenatal period caused non-pecuniary damage to a child born alive, he/she may through his/her statutory representatives or in person within the period of two years after reaching the age of majority claim compensation for the harm sustained.

The state of pregnancy is a circumstance of health that is so vulnerable to a risk of many complications that any medical activities in this period should be undertaken with the highest conscientiousness so that they lead to successful results. Some of the numerous reasons for complications during pregnancy and delivery being the physicians' fault and resulting in a conceived child's harm include: failure to diagnose or late diagnosis of congenital or genetic disorders, failure to refer a mother to specialist genetic tests, failure to diagnose or late diagnosis of the mother's disease endangering her life and the life of the foetus, disrespect for motherly or foetal reasons for planned caesarean section, a lack of proper monitoring of the mother's or foetus' state during delivery, especially disrespect for reasons for emergency caesarean section and as a result failure to perform it or delayed performance, unskilful hand grips during natural vaginal birth or too strong pharmacological induction of labour and birth.[59]

Defective medical treatment of a pregnant woman in relation to pregnancy and delivery often leads to disastrous health complications to a child born this way. These include, inter alia, foetal hypoxia, intracerebral haemorrhage and as a result damage to the brain leading to persistent cerebral palsy, clavicle fracture, brachial plexus injury and so on.[60] At present, patients' awareness of the possibility of claiming compensation for damage caused during medical treatment is constantly growing. More and more frequently, the aggrieved newborn baby's parents as his/her statutory representatives take legal action on his/her behalf and claim compensation adequate to the harm sustained straight after the child's birth.

That is why, also in this case, it may occur to be controversial whether the newborn baby is entitled to compensation if due to his/her incomplete intellectual development connected with age or mental condition (provided that the harm caused resulted in persistent damage to the brain), he/she can neither properly assess nor express the scope of harm sustained. In fact, a court awarding compensation also takes into account the consequences of the damage that may most probably occur in the future. Thus, if as a result of defectively performed prenatal healthcare a sick child is born, a court also takes into consideration all the related hardships that he/she will have to suffer from in the whole period of his future life. However, there is no doubt it can be stated that at the moment of claiming compensation for harm and often also at the time of ruling, the aggrieved baby is able neither to assess nor

[59] J. Szczapa, *Neonatologia. Wydanie II* [Neonatology. 2nd edition], PZWL, Warsaw 2015, p. 63 ff; W. Kawalec, R. Grenda, H. Ziółkowska, *Pediatria. tom 2* [Paediatrics. Vol. 2], PZWL, Warsaw 2013, p. 745 ff; J. Gadzinowski, *Neonatologia* [Neonatology], Warsaw 2015, pp. 1, 6–7, 10–11.

[60] J. Szczapa, *Neonatologia...* [Neonatology...], p. 63 ff.

to express it. It also often happens that a baby dies as a result of the damage just a few months after birth and the initiation of litigation. Then, the potential harm could take place only in the period when the aggrieved was really able to feel it. However, also in this case, applying the objective criterion of explaining the essence of the results of personality rights infringement, it is necessary to recognise that the damage to the person concerned is real.

In this place, it is purposeful to discuss the way in which the Supreme Court treats the issue of compensation to the babies aggrieved in the prenatal period. The example is a tragic case of a child who sustained damage during the delivery. The case was referred to the Supreme Court for adjudication in 2011.[61] In 2008, a pregnant woman, the mother of the aggrieved child, was admitted to hospital to give birth to her baby. However, the birth did not start in the planned term so doctors decided to induce labour. The attempts proved ineffective. Although there were medical reasons for caesarean section, the attempts to induce natural vaginal birth were continued and took nine days. The baby was eventually born after a 14-hour delivery but without any signs of life. It resulted in hypoxic ischemic encephalopathy with permanent brain damage. Having heard the case, the District Court in Tarnobrzeg held that in the short period of life (the baby died 14 months after birth), the plaintiff was unimaginatively sick, "helpless and inert in the whole medical procedure that served only and exclusively maintaining the baby's basic living functions". The Court stated that the baby was excessively harmed and it is not possible to calculate or rationally estimate his pains. The court ruled PLN 1,000,000 in damages and substantiated the decision this way: "just in the realities of this case, the compensation ruled is adequate and if the court had not accepted the claim, a claim for a similar amount in compensation would be impossible to be ruled in any other case". Inability to feel the harm by the baby did not constitute an obstacle to award one of the highest compensation amounts at that time. However, the second instance court, hearing the appeal against the judgement of the District Court in Tarnobrzeg, reduced the compensation to PLN 200,000 explaining that although the baby felt physical pain, he did not suffer psychical pain connected with the feeling of harm, did not benefit from the compensation, which his parents as statutory heirs inherited. The plaintiffs made a cassation appeal to the Supreme Court, which reversed the decision of the Appellate Court in Rzeszów and dismissed the appeal. In the justification, the Supreme Court stated that the circumstance that the baby did not have a developed psyche could not mean that he did not suffer psychical pain, either. Thus, the final sum of compensation was PLN 1,000,000 and was awarded to the heirs of the child.

The case is one of the numerous instances of causing damage to a child's health in the prenatal period, the signs of which are evident just after birth. Courts hearing cases concerning claims for compensation for damage sustained before delivery have no doubts that, although there is a lack of sufficient consciousness of the aggrieved, the minors are entitled to be awarded damages. It would be unbelievable to wait

[61] Supreme Court judgement of 24.03.2011, I CSK 389/10, OSNC-ZD 2012/1, item 22, with a gloss by M. Neterowicz, Przegląd Sądowy No. 7–8, 2012, pp. 197–202.

with adjudication until a child reaches a state of adequate intellectual development to be able to understand and express what his or her condition is. The more so, as due to the extent of the damage caused to their health, there is no certainty how long they are going to live.

3. CONSLUSIONS

The circumstance of being provided healthcare services increases the risk of sustaining various types of non-pecuniary harm that result in bodily injuries or health disorders, which are the most painful ones for the aggrieved. In this context, claiming compensation for the harm sustained by people who, because of their mental state or incomplete intellectual development connected with age, have no ability to perceive harm proved to be controversial. That is why, it is necessary to note that inappropriate medical proceedings may lead to such damage to a patient's health that often results in severe and permanent damage to the brain. The aggrieved patient is often in cerebral coma, which results in the "vegetative" state. A patient does not feel anything, does not react to stimuli, is unconscious and has no contact with the surrounding world. Quite commonly, harm to patients' health is also made in the prenatal period, which becomes evident straight after birth when the psyche is not yet developed to the extent letting the patient assess the harm. However, it must be stated that the right to compensation does not depend on the possibility of assessing the extent of the sustained harm by the aggrieved party. The subjective feelings of the aggrieved are not important. What is important is the reference to objective and rational reactions of the community. An objective method of assessing the extent of harm is important in determining compensation to the aggrieved patients, which also makes it possible to provide compensation for the results of tragic medical errors even if the aggrieved cannot feel them.

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OBJECTIVE ASSESSMENT OF HARM IN ORDER TO ESTABLISH COMPENSATION TO THE AGGRIEVED PATIENT

Summary

The article presents the issue of using objective methods to assess the scale of harm in the process of establishing financial compensation for patients injured in the course of treatment. The study can be divided into two parts. The first one discusses the factual and legal situation of a person who is a healthcare beneficiary in the context of the protection of his or her personality rights. This section also presents the legal grounds for compensatory damages for providing defective healthcare services. The second part shows the significance of the objective method of assessing the extent of harm inflicted, as exemplified by patients injured during a prenatal period and patients in the cerebral coma.

Keywords: harm, financial compensation, patient, health services, personality rights, prenatal injuries, cerebral coma

ZOBIEKTYWIZOWANY SPOSÓB OCENY ROZMIARU KRZYWDY PRZY USTALANIU ZADOŚĆUCZYNIENIA PIENIĘŻNEGO NA RZECZ POSZKODOWANEGO PACJENTA

Streszczenie

Artykuł przedstawia problematykę posługiwania się zobiektywizowanym sposobem oceny rozmiaru krzywdy przy ustalaniu zadośćuczynienia pieniężnego na rzecz poszkodowanego pacjenta. Opracowanie można podzielić na dwie części. W pierwszej omówiono sytuację faktyczną i prawną osoby będącej podmiotem świadczeń zdrowotnych w kontekście ochrony jej dóbr osobistych. W tej części przedstawione zostały również podstawy prawne kompensacji krzywdy wynikającej z wadliwości udzielania świadczeń zdrowotnych. W drugiej części ukazano znaczenie zobiektywizowanego sposobu oceny rozmiaru krzywdy na przykładzie pacjentów poszkodowanych w okresie prenatalnym oraz pozostających w śpiączce mózgowej.

Słowa kluczowe: krzywda, zadośćuczynienie pieniężne, pacjent, świadczenia zdrowotne, dobra osobiste, szkody prenatalne, śpiączka mózgowa