

Ewa Bagińska\*

## REMEDYING PATIENTS FOR MORAL HARM ARISING FROM AN INFRINGEMENT OF PATIENTS' RIGHTS

### Abstract

*The subject matter of the paper is the pecuniary protection of patients' rights in non-personal injury cases. The paper distinguishes between cases where the infringement of patients' rights coincides with the infliction of physical injury (compensable damage), creating pecuniary claims, and cases where the violation of patients' rights does not result in any damage (non-personal injury cases). On what basis should the patient be protected in the latter situation? The Author endorses the Polish solution contained in Article 4 of the Act on Patients' Rights. A person who has suffered a violation of patient rights, regardless of whether he or she sustained any damage, has an explicit claim for pecuniary compensation that is separate from a claim for reparation of moral harm due to personal injury. Such a claim protects the dignity, privacy and autonomy of a patient, regardless of the diligence and effectiveness of any medical intervention. This paper examines the application of this rule by the Polish courts. The rule reflects the theory that most patients' rights are civil personal interests that merit an express rule for their protection in order to abolish the requirement of proving that a certain right is recognized as a protected interest. The new Polish Act on Patients' Rights follows the above rule. However, negligence should be the precondition of the liability.*

### Keywords

*patients' rights - compensation - non-pecuniary loss - personality rights - informed consent - wrongful birth claims*

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\* Professor at the Department of Insurance Law, Faculty of Law and Administration, Nicolaus Copernicus University, Toruń.

## I. INTRODUCTION

This article focuses on the legal nature of patients' rights and the scope of protection granted to aggrieved patients by civil law. The discussion of patients' rights is necessarily permeated by ethical, constitutional and international considerations. Several of the rights are rooted in values such as dignity, the autonomy of the patient, liberty and physical integrity. Therefore, we find them not only in the internationally binding documents, but also in European constitutions<sup>1</sup>. Personal freedom to decide about one's own life and limb plays a central role in those regulations. The emphasis on rights rather than on duties reflects the demise of the paternalistic model of patient-doctor relations. From the perspective of private law violation of the rights gives rise to individual claims against the wrongdoer.

There are varying approaches to regulating patients' rights in Europe: from the drafting of a separate law or a patients' charter to incorporating the rights in different legal instruments regulating the functioning of a domestic health care systems<sup>2</sup>. Patients' rights are often contained in a patients' charter or incorporated into existing statutory acts. In Poland, until 2008 patients' rights were protected by several regulations, among them: the Act on the Professions of Physician and Dentist (1996), the Act on Medical Care Establishments (1991, hereafter: MCE Act), the Act on Psychiatric Health Protection (1994), and the Code of Ethics for Physicians and Patient Rights Charter issued by the Ministry for Health<sup>3</sup>. The Act of 6 November 2008 on Patients' Rights and the Patient Ombudsman<sup>4</sup> (hereafter: the Patients' Rights Act) established a regulatory

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<sup>1</sup> For example, the Polish Constitution of 1997 ensures the right to health protection, equal access to health care institutions financed from public sources within the law (Article 68), protection of life (Article 38), protection from medical experiments without a consent voluntarily expressed (Article 39), personal liberty (with limitations foreseen by the law; Article 41), legal protection of private and family life, respect for dignity, good reputation, and the right to decide upon one's own personal life (Article 47), nationals' access to official documents and data bases (Article 51) referred thereto, freedom of conscience and religion (Article 53).

<sup>2</sup> See M. Viononen, *The Role of the World Health Organization in Realising the Right to Health Care*, [in:] A. Den Exter, H. Hermans (eds), *The Right to Health Care in Several European Countries*, Hague: Kluwer Law International 1998, p. 25 et seq.

<sup>3</sup> See M. Śliwka, *Prawa pacjenta w prawie polskim na tle prawnoporównawczym* [Patients' Rights in Polish Law in a Comparative Perspective], Toruń: Dom Organizatora TNOiK 2008.

<sup>4</sup> Dz. U. [Journal of Laws] 2009, No. 52, item 417 and No. 76, item 641.

process to implement the European and worldwide standards in this field. The catalogue and contents of the rights were transferred with slight modifications from MCE Act to the Patients' Right Act. Although parallel regulations were not abrogated, but only changed accordingly, the Act should now be considered a basic legal fundamental of patients' rights in Poland. The catalogue of patients' rights is contained in chapters 2–11 of the Act. It includes the right to medical services, the right to information, the right to informed consent (with a specific regulation concerning minors and mentally incompetent patients), the right to intimacy and protection of dignity, the right to confidentiality, and the right of access to medical documentation. A new right to object to an opinion or decision of a doctor, as well as the right to safety of valuables deposited in a hospital, were added to this list.

## II. THE PLACE OF PATIENTS' RIGHTS IN LEGAL SYSTEMS IN THE CONTEXT OF LIABILITY RULES

### 1. THE LEGAL CHARACTER OF THE RIGHTS OF PATIENTS

In the theory of private law patients' rights may be considered as personality interests (values) or as subjective rights aimed at the protection of personality interests (values)<sup>5</sup>. This differentiation has always been a bone of contention in Polish legal academic writing, which was attracted partly by the Germanic and partly by the French theories on personality rights. Depending on whether one accepts or rejects the partition and diffusion of the legal category of "protected personality values"; both approaches may offer an array of arguments supporting the view that patients' rights belong to the category of personality interests.

According to the dominant view in Polish civil law writings, personality interests are considered objectively as values that have

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<sup>5</sup> See M. Nesterowicz, *Prawa pacjenta i zadośćuczynienie pieniężne za ich naruszenie w prawie medycznym i cywilnym* [Patients Rights and Compensation for Their Violation in Medical and Civil Law], *Prawo i Medycyna* [Law and Medicine; PiM] 2005, no. 2, p. 96, M. Safjan, *Kilka refleksji wokół problematyki zadośćuczynienia pieniężnego z tytułu szkody wyrządzonej pacjentom* [Some Reflections on the Compensation for Patients' Injury], *Prawo i Medycyna* [Law and Medicine] 2005, no. 1, p. 11 et seq.

an immaterial nature and are closely connected to human beings. Such values determine the existence and status of a person in society. Personal interests are not rooted in a legal relation, but in a legal norm based on objective and commonly accepted values and interests. These interests are immaterial, inalienable and absolute. The interests enumerated in Article 23 of the Civil Code (kodeks cywilny, KC) are the most important personal interests, but this list is not exhaustive. In my view, a patient right may be classified as a private subjective right that exists independently from any private law relation, be it a contractual relation with a medical service provider or any public law relation with a health care institution which provides publicly financed services. Traditionally, the theory of civil law requires the *sine qua non* link between a subjective legal right and a legal relation. However, according to modern trends in legal writing although a person must be the subject of a legal right, the existence of a legal right is not conditional upon a person being in a legal relation<sup>6</sup>. Accordingly, most patients' rights can be classified as subjective rights binding *ex lege*, regardless of a contractual or non-contractual character of the relationship between the doctor (service provider) and the patient<sup>7</sup>. If we assumed otherwise, i.e. that patients' rights must always arise from an existing legal relation, we would put some rights out of the scope of protection. Therefore, it is better to say that patients' rights are not rooted in a legal relation, but in a legal norm (rule) based on objective and commonly accepted values and interests.

As mentioned above, the legal fundament of these rights is of course not restricted to purely domestic rules. With respect to the contents of patients' rights, the common standards stem primarily from the adaptation of the European legal systems to the Biomedical Convention<sup>8</sup>. This is also true for the countries that have not ratified the Convention yet, as for example Poland, where the Convention standards are being transposed

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<sup>6</sup> See M. Pyziak-Szafnicka, [in:] M. Safjan (ed.), *System Prawa Prywatnego: Prawo cywilne - część ogólna* [System of Private Law: Civil Law - General Part], vol. 1, Warszawa: C. H. Beck 2007, p. 700 et seq.

<sup>7</sup> See M. Kolasieński, *Ochrona dóbr osobistych w prawie medycznym* [Protection of Personality Interests in Medical Law], *Prawo i Medycyna* [Law and Medicine] 2002, no. 11, p. 42.

<sup>8</sup> Convention on Human Rights and Biomedicine adopted by the Council of Europe in Oviedo, opened for signature in April 1997.

to the national systems by courts and proclaimed by legal scholarship<sup>9</sup>. Conversely, the commonly accepted preferences for the protection of human dignity, life, and health exert a significant influence on the extent of the domestic protection of patients' rights. This includes the shaping of legitimate expectations of citizens towards the State as regards the organization of health care services in a given area.

Moreover, it should be added that in the EU countries pursuant to the Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare<sup>10</sup>, patients should have a means of making complaints and be guaranteed remedies and compensation in accordance with the legislation of the Member State regarding treatment when they suffer harm arising from the cross-border healthcare they receive (Article 4)<sup>11</sup>. Whilst the first part of this new protection standard is fulfilled in most of the EU countries through the institution of ombudsmen, or incorporated in the no-blame alternative compensation system in existence, the second part (remedies and compensation) may be missing and at least varies to great extent.

At this point an additional interesting observation should be made regarding Polish law. The Polish Supreme Court denies unconditional inclusion of fundamental rights (such as e.g. the right to due process) in the category of personality interests<sup>12</sup>. The Court underlines that the right to due process, although warranted on international and constitutional levels, is granted to a person in connection with his or her status in the given sphere of social life. There is no ground to hold that all fundamental rights, as well as personal freedoms and interests listed in the Constitution, should be protected by the civil law (Article 24 KC). This position may have some

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<sup>9</sup> The Convention on Human Rights and Biomedicine in its Arts 5-9 lays down basic principles of the patients' right to information.

<sup>10</sup> O. J. 2011, L 88/45.

<sup>11</sup> Recital 24 of the preamble; Member States should ensure that mechanisms for the protection of patients and for seeking remedies in the event of harm are in place for healthcare provided on their territory and that they are appropriate to the nature and extent of the risk. However, it should be for the Member State to determine the nature and modalities of such a mechanism.

<sup>12</sup> See Sąd Najwyższy [Supreme Court] in the judgment of 6.05.2010, II CSK 640/09, Orzecznictwo Sądu Najwyższego – Zbiór Dodatkowy [Decisions of the Supreme Court – Supplement; OSN-ZD] 2011, no. A, item 4.

impact on the approach to those patients' rights that are guaranteed on a constitutional or international level.

Finally, it should also be observed that under many systems, in particular in the former socialist countries, the theory that the legal status of a patient is subject to public law rules is still quite strongly supported by legal scholars<sup>13</sup>. On the one hand, public law theory is not without relevance to the juxtaposition of rights and duties of patients in the public health care systems<sup>14</sup>. On the other hand, in the ternary structure of the publicly financed health insurance (i.e.: the National Health Fund – health care service providers – patients) the determination of the nature of the relation between the patient and the service provider should not have any impact on the scope of the protection of the former's rights and interests. Therefore, the approach that separates "universal patients' rights" from any legal relations is worthy of approval.

## 2. THE LEGAL IMPLICATIONS OF THE CATEGORIZATION OF PATIENTS' RIGHTS AS PERSONALITY INTERESTS OR SUBJECTIVE RIGHTS

According to the view presented herein most patient subjective rights protect the personality interests with which they are inherently connected<sup>15</sup>. For example, the right to informed consent or refusal of certain services protects the freedom and autonomy of a person; the right to die in dignity and the right to respect for privacy protect dignity, etc. By their nature these rights are immaterial and inalienable; they may as well be called absolute (as they bind all the world, i.e. *erga omnes*). It should be observed, however, that not all patient rights would fall under the category of absolute subjective rights<sup>16</sup>. Some of them should rather

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<sup>13</sup> See J. Bujny, *Prawa pacjenta. Między autonomią a paternalizmem* [Patients' Rights. Between Autonomy and Paternalism], Warszawa: C. H. Beck 2007, p. 24 et seq.

<sup>14</sup> See M. Nesterowicz, E. Bagińska, A. den Exter, *Poland. Medical Law*, [in:] *International Encyclopaedia of Laws*, Warszawa: Kluwer Law International 2007, no. 31; the contributions by K. Tymowska, Z. Hartman, I. Zagar, J. Simek, [in:] Den Exter, Hermans (eds), supra note 2.

<sup>15</sup> The judgment of the Sąd Najwyższy [Supreme Court] of 7.11.2000, I CKN 1149/98, not published.

<sup>16</sup> Compare the division of patient legal rights in Sweden into primary rights (that can be fully enforced before an administrative courts), secondary rights (that reflect the obligations envisaged in law, but can be challenged on grounds of illegality) and tertiary rights

be described as relative subjective rights, which means that they should be correlated with a legal duty incumbent on a health care service provider (doctor, hospital, nurse, etc.). In particular, the right to health care services that meet the requirements of medical science is a right enforceable *inter partes*, i.e. only against a service provider<sup>17</sup>. On the other hand, the right to honest medical procedure based on medical criteria and determining the priority of access to services in cases of limited availability may be treated either as a subjective relative right or as a right emanating from the principle of equal treatment. The right to quality care or the right to freely choose a health professional are subject to limited resources and hence any reasonable restrictions, subject to non-discrimination and proportionality, seem to put acceptable limits to the legal protection. Some authors distinguish positive and negative patients' rights, while observing that the latter enjoy better protection of civil law<sup>18</sup>.

In many continental systems the determination of the relationship between patients' rights (typically found in separate statutes) and the general system of protection of personality rights (that is typically found in a civil code) is an important and practical issue. Viewed from a comparative perspective, the issue of remedying infringements of personality rights is highly complex. The different systems of protection that operate in Europe vary from the general rule of liability (France, Spain, Belgium), or the general rule of protection of all personality interests or of specific personality rights (whilst this category is open to development by the courts, e.g. in Poland, Greece, the Netherlands, Germany), to the systems where no universal personality right has been acknowledged (as in England). Factors such as difficulties in categorizing the area of personality rights, and the overlapping of certain rights and systematic cultural differences significantly impede any comparative analysis<sup>19</sup>.

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(enforceable only in special courts). See L. Fallberg, E. Borgenhammar, *Patient Rights – a Swedish Perspective*, *European Journal of Health Law* 1995, no. 2, pp. 341-342.

<sup>17</sup> See Śliwka, *supra* note 3, p. 37.

<sup>18</sup> See J. Herring, *Medical Law and Ethics*, Oxford: Oxford University Press 2008, pp. 18-19.

<sup>19</sup> See W. V. H. Rogers, *Comparative Report*, [in:] W. V. H. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective*, Wien-New York: Springer 2001, p. 279 et seq.; C. van Dam, *European Tort Law*, Oxford: Oxford University Press 2006, pp. 149-150.

With respect to **personal injury cases**, in principle, compensation of non-pecuniary loss is not questioned in any European country, although the legal grounds for reparation, its scope and the actual awards differ considerably from system to system<sup>20</sup>. A thorough comparative analysis has shown that the dominant (if not exclusive) purpose of these damages in the context of personal injury is compensation<sup>21</sup>. As the aim of damages is to compensate non-pecuniary harm that *per se* is hardly measurable, jurisprudence has developed several criteria for assessment of the damages. Each case of bodily injury and mental harm requires an individual approach with regard to the facts of the case. Tariffs and rigid schemes are for some countries unthinkable, but they exist in others. It should be noted that in a vast majority of countries there exist no tables that systematically report the amounts of compensation granted by courts.

There are bigger discrepancies in Europe with respect to compensation for non-pecuniary loss in **non-personal injury cases**. It should firstly be observed that apart from the primary compensation function, in at least four countries the subsidiary punitive function of the damages is recognized (e.g. England, Germany, Poland, and the Netherlands), and in some others it is done so more covertly. More importantly, the courts in some countries (e.g. France, England) have held that lack of proof of actual damage will not bar a claim for compensation for non-pecuniary loss (at least not in defamation and other cases of infringement of personality interests). For example, Article 9 of the French Civil Code states that the victim whose privacy has been invaded may ask the judge to take appropriate measures to prevent or put the invasion to an end, which includes damages that will be assessed pursuant to the general tort rules. However, a French court usually explains in its decision that the damage through an invasion of privacy consists in the infringement of the victim's natural feeling of decency<sup>22</sup>.

Notwithstanding the mentioned discrepancies, the convergence of national systems is made visible by the practice of the European Court of Human Rights (ECHR). The Court has to consider in particular to what

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<sup>20</sup> See van Dam, *supra* note 19, pp. 322-323.

<sup>21</sup> See Rogers, *supra* note 19, p. 251.

<sup>22</sup> See S. Galand-Carval, *Non-Pecuniary Loss Under French Law*, [in:] Rogers (ed.), *supra* note 19, p. 103.



extent a patient right imposes a positive obligation upon the State<sup>23</sup>. It has, for instance, applied Article 8 of the ECHR to enhance protection of the right to privacy and family life against non-state respondents (see below in the section on reproductive torts).

The legal implications of the categorization of personality interests and rights may be illustrated by German case law. The general personality right developed by the *Bundesgerichtshof* for the better protection of human dignity has proved an effective instrument for protecting all kinds of aspects of the person<sup>24</sup>. This notion allowed for awarding compensation in medical law cases in which it was hard to establish the violation of the right to bodily integrity or the right to health, i.e. the protected interests explicitly mentioned in § 823 I BGB. For instance, the infringement of the general personality right was found in a case of disclosing medical data to third parties without the consent of the person involved, or in a case of destruction of a man's sperm without his consent after a surgical procedure that involved the inherent risk that he would become infertile. It is nevertheless observed that the fact of the violation of a general personality right is not easily established in court<sup>25</sup>.

As concerns the question of liability towards the patient we should distinguish between cases where the infringement of patients' rights coincides with the infliction of physical injury, and cases where the violation of patients' rights does not result in any 'physical harm' (non-personal injury cases). Examples of conduct not bringing about personal injury include for example: committal proceedings of patients to psychiatric hospitals, refusing access to medical files, or lack of informed consent to a medical procedure which proved successful. The proposed distinction is of course a matter of convention. It may easily be abolished on the grounds of the definition of damage. Even though at the outset it would seem that any kind of grievance is potentially covered by the notion of damage, it is clear that not every harm suffered by another person is compensable under tort law. It is agreed that establishing an obligation

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<sup>23</sup> See M. Davis, *Textbook on Medical Law*, London: Butterworths 1998, pp. 16-17; I. Kennedy, A. Grubb, *Medical Law*, London: Butterworths 2000, p. 31.

<sup>24</sup> See B. Markesinis, H. Unberath, *The German Law of Torts. A Comparative Treatise*, Oxford: Hart Publishing 2002, pp. 412-415.

<sup>25</sup> See van Dam, *supra* note 19, pp. 76-77.

to compensate for the damage requires an interference with a legally protected interest<sup>26</sup>. Hence, viewed from the angle of a commonly accepted definition of damage, the very violation of a patient right, which is a legally protected interest, will constitute harm<sup>27</sup>. This harm may be material or immaterial. An immaterial damage is defined as “loss which is not damage to a person’s assets, wealth or income and which is therefore incapable of being quantified in any objective financial manner by reference to a market”<sup>28</sup>. For some national systems it would not seem incorrect to say that there is harm, but no compensable damage.

The foregoing analysis allows for the conclusion that the regime of liability for violations of patients’ rights and the availability of a claim for damages is directly dependent on the status and the theoretical nature of the rights accepted in a given system. When the violation of a patient right does not lead to bodily injury, pain, and suffering, or mental distress amounting to a compensable moral harm, the patient’s claim for reparation in money is not so obvious. It follows from the above that, depending on the system, such a claim may be conditioned upon proving that 1) a given interest is a legally protected interest, and/or 2) that this particular interest is protected by a claim for damages, and not *just* by another remedy (such as by a claim for an apologetic or corrective statement by a wrongdoer, or an order to abstain from infringement). The question as to the basis on which the aggrieved patient should be protected in a non-personal injury case is dealt with below.

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<sup>26</sup> See H. Koziol, [in:] European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien, New York: Springer 2005, pp. 24, 27.

<sup>27</sup> The answer may naturally depend on the approach of the particular legal system to the notion of personal injury. See B. Koch, H. Koziol, *Comparative Analysis*, [in:] B. Koch, H. Koziol (eds), *Compensation for Personal Injury in a Comparative Perspective*, Wien, New York: Springer 2003, pp. 410-411.

<sup>28</sup> See Rogers, *supra* note 19, p. 246.

### III. THE BASIS AND PREMISES OF THE CLAIM FOR COMPENSATION FOR THE VIOLATION OF PATIENTS' RIGHTS

#### 1. THE LEGAL BASIS OF THE CLAIM IN POLISH LAW

In this article I argue that a person harmed by a violation of patient rights which did not relate to any material damage should have an explicit claim for pecuniary compensation. I am convinced that a claim for non-pecuniary loss is a most important and effective civil sanction in cases of infringement of patients' rights. In Poland, this solution was envisaged for more than a decade by the Medical Care Establishment Act<sup>29</sup> and then transferred to the 2008 Patients' Rights Act. It has also been introduced in several other systems (among others in the Czech Republic, Latvia, Lithuania, Slovenia, Finland, and Portugal)<sup>30</sup>.

The strengthening of the patient's position in Poland first took place in 1997 through the enactment of Article 19a of the MCE Act (now Article 4 of the Patients' Rights Act)<sup>31</sup>, which provided for compensation in the case of violations of rights envisaged in Articles 18 and 19 of the MCE Act. As Poland belongs to the group of systems where damages for non-pecuniary loss may be awarded in specific cases only<sup>32</sup>, one of the effects of the 1997 changes to the MCE Act was to introduce a specific legal avenue for seeking pecuniary remedies by patients' whose rights were infringed<sup>33</sup>.

The Patients' Rights Act has not changed the main rules on liability for infringement of patients' rights. It stipulates a claim for compensation in Article 4. A person harmed by a negligent breach of patient rights may claim pecuniary compensation for moral damage in an action based

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<sup>29</sup> In Polish law patient rights are protected by several regulations. Among them of most importance are: the Act of 5.12.1996 on the Professions of Physician and Dentist, the Act of 30.08.1991 on Medical Care Establishments, and the Code of Ethics for Physicians and Patient Rights Charter issued by the Ministry for Health.

<sup>30</sup> See B. A. Koch, *Medical Malpractice in Europe: Comparative Analysis*, [in:] B. A. Koch (ed.), *Medical Liability in Europe. A Comparison of Selected Jurisdictions*, Berlin: de Gruyter 2011.

<sup>31</sup> O. J. 1997, No. 104, item 661.

<sup>32</sup> See E. Bagińska, M. Nesterowicz, *Non-Pecuniary Loss under Polish Law*, [in:] Rogers (ed.), *supra* note 19, p. 173.

<sup>33</sup> See Nesterowicz, Bagińska, den Exter, *supra* note 14, no. 142.

on Article 448 KC<sup>34</sup> (Article 4 sec. 1). In a case of breach of the right to die in dignity, a spouse, the next of kin, or a guardian may claim a sum of money to be paid for the benefit of a charitable institution (Article 4 sec. 2). Traditionally, the courts have viewed a claim for the account of a charity (based on Article 448 KC *in fine*) as a private (civil) penalty<sup>35</sup>. The sum awarded to a charitable institution indeed plays two functions: a compensation function and a deterrence function. I believe that the same functions might be assigned to the claim for the account of a charity based on Article 4 sec. 2 of the Patients' Rights Act.

The dominant doctrinal opinion holds that although Article 19a of the MCE Act (now Article 4 of the Patients' Rights Act) refers to Article 448 KC, the plaintiff does not need to prove a violation of a particular personality right. In a way, Article 4 of the Patients' Rights "assists" a patient in the establishment of his claim by providing for explicit situations in which a claim for damages shall arise. The discussed ground of compensatory claim applies both to contractual and to tortious violations. We should also add that on 9 September 2008<sup>36</sup> the Supreme Court (the panel of 7 judges) ruled that a party injured by the violation of personality interests might demand, on the basis of Article 448 KC, the payment of damages for both herself and a social institution in order to reach full satisfaction. This approach had already been taken in a few earlier cases<sup>37</sup>. An opposite view (in fact, prevailing in doctrine) argues that the claimant whose personal interests have been violated may demand only one type of compensation to be paid, either for his benefit or for

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<sup>34</sup> Article 448 KC reads: "In the case of infringement of personal interests, the court may award an injured person an adequate sum as compensation for non-pecuniary loss or, if he so demands, award an appropriate sum for a designated social purpose, irrespective of other means necessary to eliminate the effects of the damage caused".

<sup>35</sup> See the judgment of the SN of 19.06.2007, III CZP 54/07, *Orzecznictwo Sądu Najwyższego - Izba Cywilna - Zbiór Dodatkowy* [Decisions of the Supreme Court - Supplement; OSNC-ZD] 2008, no. B, item 36; the judgment of the SN of 9.09.2008, III CZP 31/08, *Orzecznictwo Sądu Najwyższego - Izba Cywilna* [Decisions of the Supreme Court - Civil Chamber] 2009, no. 3, item 36.

<sup>36</sup> III CZP 31/08, *Orzecznictwo Sądu Najwyższego - Izba Cywilna* [Decisions of the Supreme Court - Civil Chamber; OSNC] 2009, no. 3, item 36.

<sup>37</sup> For instance: judgment of the SN of 16.04.2002, V CKN 1010/00, *Orzecznictwo Sądu Najwyższego - Izba Cywilna* [Decisions of the Supreme Court - Civil Chamber; OSNC] 2003, no. 4, item 56 and judgment of the SN of 17.03.2006, I CSK 81/05, *Orzecznictwo Sądów Polskich* [Decisions of Polish Courts; OSP] 2007, no. 3, item 30.

the designated social purpose. The latter claim is independent of other remedies and only special circumstances may justify a court's refusal to award damages for non-pecuniary loss. The function of art. 448 KC is to compensate the loss rather than to prevent harm<sup>38</sup>.

Although *ex Article 19a* of the MCE Act provided for the protection of the rights enumerated in Article 18 and 19 of the MCE Act<sup>39</sup>, it was given an extensive interpretation. As a result, any patient right guaranteed by a statute related to the provision of health care fell within the scope of Article 448 KC<sup>40</sup>. Moreover, should a "new" patient's right be a subject of a debate and dependent on a court's recognition<sup>41</sup>, Article 448 KC will provide a legal ground for seeking compensation for negligent infringement of the right. The outcome of any "new" case might nevertheless depend on a court's approach to the burden of proof.

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<sup>38</sup> The interpretation of Article 448 KC endorsed in the commented decision of 9 September 2008 seemingly shows a more modern approach to the protection of personality rights. If an aggrieved party is to achieve full satisfaction by demanding payment of damages for both herself and a social institution, the law should enable her to make such claims. It is for the courts to put reasonable limits to the application of the *cumul* of claims.

<sup>39</sup> According to Article 19 of the MCE Act a patient had a right to: 1) health care services which meet the requirements of medical science, and, in cases of limited availability of provision of treatment, to honest medical procedure based on medical criteria and determining the priority of access to those services, 2) be informed of his health condition, 3) informed consent or refusal of certain services, 4) respect for privacy and dignity while receiving health care services, 5) die in peace and dignity. Moreover, in medical institutions destined for persons requiring constant or daily health care patients had also the right to additional nursing aid performed by a close or individually designated person, to personal, telephone or mail contact with persons from outside the institutions and to pastoral care. Hospitals ensure the protection of the patient's data and medical charts, which may be accessed only by the patient or his proxy or guardian or by other institutions when a statute so allows (Article 18 of the MCE Act). This included the right to informed consent or refusal of certain services, to be informed of the health condition, to respect for privacy and dignity while undergoing health care activities and to die in peace and dignity.

<sup>40</sup> According to Polish law, in the case of negligent disclosure by a Health Insurance Fund of personal data and information concerning the condition of health and the mode of treatment of an insured person, a court may award the injured person appropriate compensation for the ensuing harm. The provision of Article 4c the Law on Family Planning imposes on persons carrying out services regulated by the statute (i.e. physicians performing abortion or giving medical advice to a pregnant woman) a duty to keep confidential all information provided in connection with the services. Negligent breach of confidence entitles the patient to compensation for non-pecuniary loss.

<sup>41</sup> For example, is there an unconditional right of a child to know who their biological father is? This right was recognized in the Swedish Insemination Act of 1984, although it had been vigorously debated. See Fallberg, Borgenhammar, *supra* note 16, p. 342.

In a “typical” situation of a violation of personality interests the plaintiff has to allege an infringement of a legally acknowledged personal interest within the meaning of Article 448 KC. With respect to patients’ rights, the practice of lower courts has not been uniform owing to the theoretical constraints mentioned above. In my opinion, regardless of which theory a court accepts, it should take advantage of the fact that many patient rights that are not expressly granted in the domestic legal system have been articulated on the supranational level, and especially in the Biomedical Convention. This approach should facilitate the position of the aggrieved patient in court.

Hence, in Polish law, two bases for pecuniary redress are available for the patient. The first one covers the situation when a patient suffered a medical malpractice that inflicted pain and suffering (Article 445 KC)<sup>42</sup>. The second one relates to an infringement of patient rights enumerated in the Patients’ Rights Act. The determination of the legal basis for any action belongs to the court, depending on the findings. However, the interpretation of the relationship between the two grounds has been a rather controversial issue. Although Polish law recognises the concurrence of causes of liability, so a claim for non-pecuniary loss can be based on either ground, the lower courts sometimes ignore the rule *facta probantur, iura novit curia*. The Supreme Court has held that the discussed causes of actions are separate and independent avenues for seeking compensation because of their different scopes of protection<sup>43</sup>. Already in the judgment of 14 October 2005<sup>44</sup> the Supreme Court allowed the application of Article 445 KC in the case of a violation of patient right to informed consent coinciding with personal injury stemming from medical malpractice. This approach was confirmed in the judgment of 29 May 2007 (V CSK 76/07). In this case the plaintiff did not consent to the amputation of one of the fingers cut by a saw. The doctor at first suggested its attaching, but during the treatment of the wound changed his

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<sup>42</sup> See more K. Bączyk-Rozwadowska, *Medical Malpractice and Compensation in Poland*, Chicago-Kent Law Review 2011, vol. 86, p. 1251.

<sup>43</sup> Judgment of the SN of 29.05.2007, V CSK 76/07, Orzecznictwo Sądu Najwyższego [Decisions of Supreme Court; OSN] 2008, no. 7-8, item 91.

<sup>44</sup> III CK 99/05, Orzecznictwo Sądów Polskich [Decisions of Polish Courts; OSP] 2008, no. 6, item 68.

decision and eventually amputated the finger. The defendant hospital was not prepared to perform any microsurgical procedures because of the lack of specialists and equipment. The surgeon neither sought a second opinion nor considered the possibility of replanting with any of the microsurgery centres. According to an expert witness, the plaintiff had less than 50% chance of a successful replanting. The lower courts differed in the evaluation of the evidence. The regional court found that the doctor had committed medical malpractice and violated the patient's right to informed consent. Accordingly, it awarded damages for pain and suffering. The appellate court dismissed the case by ruling to the contrary. On cassation, the Supreme Court convincingly advocated the theory of two alternative avenues for compensation, putting emphasis on the purpose of both regulations: Article 445 KC aims at compensation for pain and suffering due to personal injury while Article 19a of the former MCE Act (now Article 4 of the Patients' Rights Act) protects dignity, privacy and autonomy of a patient, regardless of the diligence and effectiveness of a medical intervention. Hence, the two rules establish liability for two different wrongful acts.

Interestingly, in the judgment of 13 June 2007<sup>45</sup> the Court of Appeals in Warsaw established the hospital's liability for the lack of informed consent to cardiac surgery, during which the patient suffered a stroke. The patient became disabled due to the neurological damage, however, no medical error was established at trial. The plaintiff claimed PLN 250,000, the Regional Court awarded PLN 50,000 as damages for moral harm, but the sum was doubled on appeal (final award PLN 100,000). This award is unusually high as for compensation for lack of informed consent; therefore we may suspect that the disability of the patient, for which no one was to blame, did, in fact, influence the calculation of the award.

The theory of concurrent grounds for compensation in cases of violation of the patient's right to informed consent co-existing with medical malpractice finds significant support in legal scholarship<sup>46</sup>. The opposite view assumes a *lex specialis – lex generalis* relation between

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<sup>45</sup> VI ACa 1246/06, Orzecznictwo Sądów Apelacyjnych [Decisions of the Courts of Appeal], 2009, no. 12, item 64, noted by M. Świdorska, *Przegląd Sądowy* [Judicial Review] 2010, no. 11, p. 201.

<sup>46</sup> See Śliwka, *supra* note 3, p. 334; Nesterowicz, *supra* note 5, p. 84; Safjan, *supra* note 5, p. 5.

Article 4 of the Patients' Rights Act and Article 445 KC. In consequence, it unreasonably restricts the catalogue of the patients' rights protected by a claim for damages to only those rights expressly listed in the Act. Given the general and open formula of personality rights in Polish law as well as the dynamic development of international and European regulation of patients' rights, one can easily predict that the catalogue of the rights will most probably expand in future. Therefore, the more extensive construction of Article 4 of the Patients' Rights Act, the better for the patient.

In the light of European developments one may argue that when the plaintiff shows in a personal injury case that his patient rights were **also** violated, or that the personal injury stems from a violation of patients' rights, the latter fact should probably be reflected in the overall award for non-pecuniary loss (increasing the quantum damages)<sup>47</sup>.

## 2. FAULT AS A PREMISE OF LIABILITY FOR VIOLATION OF PATIENTS' RIGHTS

There are several arguments that can be advanced in favour of a general rule according to which in the absence of physical personal injury, negligence of the actor should be the precondition of liability for the infringement of patients' rights.

First of all, as was mentioned before, although there are vast discrepancies in the European systems with respect to the basis and premises of liability for non-pecuniary loss in non-personal injury cases, there seems to be an accord as to fault as a requirement for pecuniary protection of personality rights. Fault and the burden of proving it are of course shaped in numerous ways, but this issue is outside the scope of the analysis.

One should point to the fact that even in the systems where personal injury is redressed regardless of fault of a tortfeasor (on the grounds

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<sup>47</sup> Subject to the national rules on liability and on damages. Whether this part of the award will be easy to identify, is a totally different matter. It would be possible to deduce this element from a French judgment, because a court in France usually explains all heads of the damage, but it would be quite unlikely with respect to Spanish judicial decisions, which tend to contain three parts of or one global award, see the French report (by S. Galand-Carval) and the Spanish report (by M. Martín-Casals, J. Ribot and J. Solé) [in:] Rogers (ed.), *supra* note 19, p. 89 et seq. and p. 213 et seq., respectively.



of strict liability or of equity)<sup>48</sup>, the divorce from fault may not necessarily be effective with respect to the non-pecuniary loss accompanying bodily injury (e.g. Austria, Italy). Correspondingly, most no-blame compensation systems exclude from their coverage a claim for compensation of non-pecuniary loss arising from personal injury, thus leaving it to the determination of common courts.

In modern tort law the subjective notion of fault has been transformed, perhaps with the exception of Austria, into a predominantly objective element. All systems tend to ignore individual abilities and deficiencies of the defendant by focusing almost exclusively on an objective assessment of the actor's behaviour, thereby restricting the availability of excuses to those lacking culpability<sup>49</sup>. Hence, professional misconduct will principally amount to negligence.

The burden of proving fault can of course be alleviated by many popular instruments, such as legal and factual presumptions or a formal shift of the burden of proof. In a case of a medical professional or health care institution, fault may be presumed from the very breach of a legal duty (in some systems it is called wrongfulness or breach of statutory duty). The practice of Polish courts indicates that proof of fault in cases of infringement of patient rights imposes no significant burden on patients. Two examples are illustrative. In a case of 14 November 2005<sup>50</sup> the plaintiff sued a hospital for the removal of her kidney without informed consent. She alleged that the surgery caused her serious personal injury and was performed for a transplantation purpose, instead of for a therapeutic one. The regional court dismissed the suit. On evidence, the plaintiff's allegations proved unsubstantiated, the operation rescued her life and it was carried out with due diligence. The Supreme Court, on the other hand,

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<sup>48</sup> The remedying of the pecuniary damage in personal injury cases in the context of the violation of the right to safety of hospitalization is most challenging. The evolution of national laws and case law (e.g. in France, Belgium) indicates the importance of the right to safety (of hospitalisation) and the shift towards strict liability. Most of the European *opinio iuris* agree that the rules on liability in the case of patients' right to safety (of hospitalisation) should be stricter (i.e. separated from the requirement of fault).

<sup>49</sup> See B. Koch, H. Koziol, *Comparative Analysis*, [in:] Koch, Koziol (eds), supra note 27, pp. 410-411.

<sup>50</sup> III CK 99/05, *Orzecznictwo Sądów Polskich* [Decisions of Polish Courts; OSP] 2008, no. 6, item 68.

held that the plaintiff had been operated on without prior formal consent<sup>51</sup>. The plaintiff proved that she had not been informed before the operations in a straightforward manner on the scope and degree of the risks, hence without this awareness she could not have given an informed consent<sup>52</sup>. Therefore, the plaintiff was entitled to pecuniary damages for the infringement of patients' rights on the basis of *ex* Article 19a of the MCE Act, even though the doctor's performance was *lege artis* and no damage occurred. In another case, the Court of Appeals in Poznań<sup>53</sup> held that a breach of the duty to inform about a contagious disease constituted a tort and that when a patient had been transmitted an infectious disease while hospitalised, the hospital's liability extended to all damage caused to him and to his family members. Although it was not established whether the hospital in fact informed the patient himself about the HCV virus, the court did not consider it critical to the question of liability for the plaintiffs' injuries.

In most systems fault seems to be relevant, whether as a premise of liability or as a factor in the determining the amount of damages for non-pecuniary loss. Although in adjudication of the damages for the violation of personal interests a court should primarily take into consideration the type of protected interest, the extent of the non-pecuniary loss, the nature of the results of infringement, the financial situation of the liable person, etc.<sup>54</sup>, the conduct of the tortfeasor is not insignificant. There is a vast difference between the systems in continental and common law Europe with respect to the recognition of a direct punitive role for civil damages. It is nevertheless agreed that deterrence and prevention have a more important role to play in cases of infringement of personality

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<sup>51</sup> There are only a few exceptions to the rule that the informed consent of a patient is the pre-requirement of a doctor's medical intervention. According to case law acting without a prior patient's consent (or a substitute consent) constitutes a doctor's fault (in his case, imputable to the defendant hospital). See M. Nesterowicz, *Prawo medyczne* [Medical Law], Toruń: Dom Organizatora TNOiK 2007, p. 122 et seq.

<sup>52</sup> Judgment of the SN of 17.12.2004, II CK 303/04, *Orzecznictwo Sądów Polskich* [Decisions of Polish Courts; OSP] 2005, no. 11, item 131.

<sup>53</sup> Judgment of 9.05.2002, ACa 221/02, *Prawo i Medycyna* [Law and Medicine; PiM] 2004, no. 1, p. 116.

<sup>54</sup> See Bagińska, Nesterowicz, *supra* note 32, pp. 180, 186.

interests than in the case of personal injury and that the pecuniary sanction must be a serious one<sup>55</sup>.

#### IV. SPECIFIC EXAMPLE OF ABORTION (REPRODUCTIVE TORTS) CASES

A good example of viewing patients' rights as a type of personality rights for the sake of seeking compensation for their violation is reproductive torts cases, embracing claims for wrongful birth and wrongful conception<sup>56</sup>. As I have argued elsewhere, one of the major theoretical concepts underlying the remediating of infringements that constitute damage in wrongful birth actions is based on the general protection of personal rights<sup>57</sup>. Although this ground of compensation is recognized in almost all European jurisdictions, its shape, and sometimes even its name, strictly depends on national regulatory restraints concerning abortion as well as on constitutional jurisprudence. Beyond doubt, this theory of compensation is heavily permeated by moral arguments. The most popular and least contested concept refers to the infringement of a woman's right to self-determination. This right embraces *inter alia* the possibility of deciding about having children, which in turn involves the exercise of a "freedom of procreation". Violation of the right may appear both in wrongful conception and in wrongful birth actions in the narrow sense both in American jurisprudence and in Europe<sup>58</sup>.

It may also be argued that when a woman is entitled to specialised prenatal examinations or to a referral to further genetic tests, any refusal of such a referral amounts to a violation of the patient's rights which merits an adequate remedy<sup>59</sup>. The nature of the harm is particular; it consists of, but is not limited to, the distress and frustration flowing from the awareness of hopelessness and the failure of the doctors to perform

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<sup>55</sup> See Rogers, *supra* note 19, pp. 289-291, 295.

<sup>56</sup> See E. Bagińska, *Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation*, *Journal of European Tort Law* 2010, vol. 2, pp. 171-203.

<sup>57</sup> *Ibid.*, p. 186.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, p. 193.

their duties<sup>60</sup>. The most important duty in this context is the duty to inform a patient so that she has grounds to make an informed and independent decision about the most important personal matters. The same is true with respect to a right to a legally justified abortion<sup>61</sup>.

For example, German courts hold that regular consultations in pregnancy, such as genetic screening, other prenatal tests and the practice of eugenic abortion, serve to prevent the birth of severely handicapped children. In a case decided in 2002 the parents were granted compensation for pecuniary damage as well as for pain and suffering in the amount of € 10,000 because of the incomplete information given to them, which was regarded as a medical error<sup>62</sup>. In this case the child was born with highly abnormal arms, legs and extremities. Although the mother had regularly attended the defendant doctor and repeatedly asked about the development of the foetus, the doctor did not alert the plaintiffs when some part of the data in fact indicated difficulties 20 weeks after conception<sup>63</sup>. In France, on the other hand, a mother would be entitled to seek non-pecuniary damages only if she has given birth to a handicapped child, unless we have a case of a *préjudice particulier*, i.e. a special loss that exceeds the normal burdens of motherhood<sup>64</sup>.

The discussed theory is to be found in the Polish cases on wrongful conception and wrongful birth<sup>65</sup>. The Supreme Court acknowledges, in general, that a right to plan a family is protected by the Civil Code (Article 23 KC) as a personality right and by the Constitution as liberty<sup>66</sup>. Hence, if abortion was wrongfully denied to a raped woman and she was compelled to give birth to a child, her right to plan a family was violated,

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<sup>60</sup> Judgment of the SN of 12.06.2008, III CSK 16/08, Orzecznictwo Sądu Najwyższego – Izba Cywilna [Decisions of the Supreme Court – Civil Chamber; OSNC] 2009, no. 3, item 48.

<sup>61</sup> I use the term “right” here in the sense of a subjective civil law right, but as an entitlement (or faculty) grounded in public healthcare law, which is nevertheless protected by both public law and private law means.

<sup>62</sup> BGH 18.06.2002, Medizinrecht [MedR] 2002, 640, cited by Bagińska, supra note 56, pp. 193-194.

<sup>63</sup> See Bagińska, supra note 56, p. 194.

<sup>64</sup> See van Dam, supra note 19, p. 159.

<sup>65</sup> See E. Bagińska, *The Liability for Wrongful Conception and Wrongful Birth in Polish Law*, Lex Medicinæ. Revista Portuguesa de Direito da Saude 2009, no. 10, p. 46.

<sup>66</sup> V CK 16/03, Orzecznictwo Sądów Polskich [Decisions of Polish Courts; OSP] 2004, no. 10, item 125 = Orzecznictwo Sądu Najwyższego – Izba Cywilna [Decisions of the Supreme Court – Civil Chamber; OSNC] 2004, no. 6, item 104.

which gives a ground for seeking compensation on the basis of Article 448 KC. However, the Court's classification of the right to planned family as a personality right under the Law on Family Planning<sup>67</sup> met with substantial doctrinal criticism, based upon the assumption that there is no conflict between the right to live and the right to an abortion, since the former always prevails<sup>68</sup>. Thus, in the judgment of 22 February 2006<sup>69</sup>, the Supreme Court modified its position. It held that "in a case where an abortion was wrongfully denied to a raped woman and the offender has not been identified, the person responsible for the denial is liable to cover the cost of the child support to the extent that cannot be covered by its mother who exercises personal care of the child". Although it again allowed a claim for compensation, the Court refused to categorise the "right to abortion" as a personality interest. According to the Court such a protected interest does not follow from Article 4a sec. 1 of the Law on Family Planning. This provision has not conferred any right to abortion on a pregnant woman, but has only abrogated the general unlawfulness of abortion under Polish law in situations of conflict between the foetus' right to life and other interests. The Court shared the view of the Constitutional Tribunal, expressed in its judgment of 28 May 1997<sup>70</sup>, that the Polish legal system ensures constitutional protection of the life of the foetus, based on the concept that a human life has to be legally protected at all stages of development, and emphasized that "one may not construe a personality right to violate a personality interest of another in the case of a collision of interests". A right to abortion is not a component of a right to plan a family<sup>71</sup>. The right to decide about having children has its negative aspect, i.e. the refusal of a child's conception. However, when the child has already been conceived the only positive aspect it has is the right to give

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<sup>67</sup> The Act of 7.01.1993 on Family Planning, Fetus Protection and Conditions of Permission of Abortion, Dz. U. [Journal of Laws] No. 17, item 78 with later amendments.

<sup>68</sup> See S. Rudnicki, *Note to the Judgment*, Monitor Prawniczy [Legal Journal] 2004, no. 10, p. 475.

<sup>69</sup> III CZP 8/06, Orzecznictwo Sądu Najwyższego - Izba Cywilna [Decisions of the Supreme Court - Civil Chamber; OSNC] 2006, no. 7-8, item 123.

<sup>70</sup> K 26/96, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 1997, no. 2, item 19.

<sup>71</sup> See E. Bagińska, M. Nesterowicz, *Medical Legislation in Poland*, Yearbook of European Medical Law 2005, p. 15.

birth to the child and raise it, and not to eliminate the life of the foetus. This change in approach of the Supreme Court has met with substantial approval by most commentators<sup>72</sup>.

In the wrongful birth judgment of 13 October 2005<sup>73</sup> the Supreme Court held that the physicians negligently violated the plaintiff's right to plan a family and the right to abortion provided by law. As a result, the parents were entitled to a claim for compensation of the pecuniary damage comprising the increased cost of the maintenance of the handicapped child born with a serious genetic condition. The Court referred to its motives in the cited judgment of 21 November 2003 and stated that the right of parents to plan a family, protected by Article 4a of the Law on Family Planning<sup>74</sup>, allowed the parents to decide about terminating pregnancy for genetic reasons. In consequence, a negligent breach of that right as well as of the right of a woman to prenatal care entitles the plaintiffs to pecuniary compensation. The doctrinal reaction to this decision was partly negative<sup>75</sup>. However, the Supreme Court in a judgment of 6 May 2010, II CSK 580/09<sup>76</sup>, confirmed its jurisprudence regarding liability for wrongful birth.

The protection of patients' rights in the said context is enhanced by the jurisprudence of the ECtHR. In the judgment of 20 March 2007, *Tysiąc v. Poland* (application no. 5410/03) the European Court found a violation of Article 8 of the European Convention in that the Polish State failed to comply with its positive obligations to secure to the applicant the effective respect for her private life<sup>77</sup>. It held that in cases of conflicting

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<sup>72</sup> See e.g. R. Trzaskowski, *Czy urodzenie dziecka może być źródłem szkody?* [*Can a Child-Birth Be a Cause of Damage?*], *Palestra* [The Bar] 2007, vol. 9-10, p. 11.

<sup>73</sup> IV CK 161/05, *Orzecznictwo Sądów Polskich* [Decisions of Polish Courts; OSP] 2006, no. 6, item 71.

<sup>74</sup> Dz. U. [Journal of Laws] No. 17, item 78, with later amendments.

<sup>75</sup> See Bagińska, *supra* note 65, p. 49 et seq.

<sup>76</sup> *Orzecznictwo Sądów Polskich* [Decisions of Polish Courts; OSP] 2011, no. 2, item 13, cmt. by M Nesterowicz.

<sup>77</sup> The case involved the procedure for obtaining a legal abortion. A woman (the applicant) who suffered from severe myopia became pregnant for the third time. After she had obtained medical advice in favour of abortion from a general practitioner, she went to a gynecologist who refused to perform the abortion. Soon after the delivery, the applicant had become almost blind and she lodged a criminal complaint against the gynecologist. After consideration of the statements of the three ophthalmologists who had examined the applicant during her pregnancy and a report by a panel of three medical experts, no causal

views (between a pregnant woman and doctors, or between the doctors themselves) as to whether the conditions for obtaining a legal abortion were satisfied or not, no effective mechanisms capable of determining the issue were in place. The availability of legal remedies which make it possible to establish liability on the part of medical staff does not imply that the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion (at 128). The patient was awarded € 25,000 as compensation for non-pecuniary loss.

In yet another Polish case (SN judgment of 12 June 2008<sup>78</sup>) the plaintiff claimed PLN 30,000 from a doctor (D1) as compensation for non-pecuniary loss caused by the infringement of her privacy in a press interview that revealed confidential information on her pregnancy and the identity of the child's father. She also demanded a sum of PLN 20,000 (€ 4,700) from doctors D1, D2 and D3 (or alternatively from the hospital in T and Kraków University Hospital) as compensation for the infringement of personal rights and of the patient right to prenatal tests. The court awarded PLN 10,000 (€ 2,350) to be paid by doctor D1 for denigrating statements he had made in a press interview about the plaintiff. The other claims were dismissed. The judgment was quashed and the case remitted for re-examination by the Supreme Court. The Court stated that a pregnant woman has a right to free prenatal tests and that the violation of this right by doctors *per se* constitutes her moral harm, which entitles her to compensation pursuant to Article 448 KC, but the amount of awarded damages in this case was too low and not sufficiently motivated. On remand, Kraków Court of Appeal<sup>79</sup> held that the defendant physician should pay PLN 20,000 for the failure to refer the woman for genetic testing as soon as the suspicions as to the foetus' condition had arisen, as well as PLN 30,000 for breach of medical confidentiality. Insofar as the action was

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link was established between the gynaecologist's conduct and the deterioration of the applicant's vision" and the criminal case was finally dismissed.

<sup>78</sup> III CSK 16/08, Orzecznictwo Sądu Najwyższego - Izba Cywilna [Decisions of the Supreme Court - Civil Chamber; OSNC] 2009, no. 3, item 48.

<sup>79</sup> Judgment of 30.10.2008, not published. It is summarised by the ECtHR in the case *RR v. Poland*, application no. 27617/04, judgment of 26.05.2011.

directed against the T Hospital, the court held that the plaintiff had not received a proper diagnosis. In respect of the defendant University Hospital, the latter had exposed the pregnant woman to unnecessary stress, while the correct diagnosis had not been made. The defendants had been aware that time was of the essence in the availability of a legal abortion, but had failed to accelerate their decision-making process. As the University Hospital had a higher referral rate, its liability was more serious as a high level of professional skill could have been reasonably expected of it. The plaintiff had legitimately expected that she would obtain diagnostic and therapeutic treatment of the requisite quality, whereas her case had in fact been handled with unjustifiable delays. The court awarded the applicant PLN 5,000 (€ 1,190) against T Hospital and PLN 10,000 (€ 2,350) against the University Hospital. The plaintiff simultaneously filed a claim to the ECtHR. In the judgment *RR v. Poland* the ECtHR found a breach of both Article 3 and Article 8 of the Convention by the Polish State. On the facts, the Court has established “violations of the Convention on account of the manner in which the applicant’s requests were handled by health professionals and because of the State’s failure to create an effective procedural mechanism by which access to diagnostic services relevant for establishing the conditions of availability of legal abortion under Polish law could be secured” (opinion, at 224). As a result of the procrastination of the health professionals the patient had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family’s future and the prospect of raising a child suffering from an incurable ailment; she was deprived of access to health services guaranteed by the 1993 Act. Such behaviour amounts to humiliation and degrading treatment (Article 3 of the Convention) and violated the woman’s right to privacy, as she had been forced to give birth to a disabled child (whereas the pregnancy could have been legally terminated). However, the ECtHR for the lack of a causal link denied compensation of pecuniary damage. As regards non-pecuniary losses, the Court found that “the applicant experienced considerable anguish and suffering, having regard to her fears about the situation of her family and her apprehension as to how she would be able to cope with the challenge of educating another child who was likely to be affected with a lifelong medical condition and to ensure its welfare and happiness. Moreover, the applicant had been humiliated by doctors’ lack of sensitivity



to her plight" (opinion, at 225). In conclusion, the Court awarded the plaintiff € 45,000 as just satisfaction. The presented judgment should be read as suggesting the correct method to assess the gravity of moral harm suffered by a pregnant woman and the extent of damages that she is entitled to, owing to the violation of her rights to prenatal testing and family planning.

In its jurisprudence the ECtHR emphasizes that that the states are not obliged to grant the citizens a right to abortion. However, if they do, just as the Polish state grants the statutory right to abortion in the Law on Family Planning of 1993, they have to guarantee its realisation; the right may not be illusory, purely theoretical, but must be an effective and practical right.

## V. PATIENTS RIGHTS AS CONSUMER RIGHTS?

In the debate about the legal nature of patients' rights one should not overlook the fact that we may treat the rights similarly to consumer rights. The latter are better protected through a combination of both private law sanctions and administrative sanctions. There is a modern tendency to see a patient as a consumer in a transaction involving a medical service paid out of pocket, and correspondingly, to treat (at least some) patients' rights as consumer rights<sup>80</sup>. Any medical service is certainly sought for a personal purpose and most of the time is not associated with the profession or business of a consumer. Even if we can imagine some services that might be indirectly associated with the business or professional activities of a consumer (e.g. an actress getting a liposuction, a tv-presenter getting a plastic surgery), the effects of the transaction are realized both in the business and personal sphere of the patient's life. There should be no doubt that a patient who seeks a health care service outside a publicly financed system should be treated as a consumer (this will allow first and foremost for the control of abusive contractual clauses). The privatization of health

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<sup>80</sup> See J. Neuberger, *Do We Need a New Word for Patients?*, British Medical Journal 1998, no. 318, pp. 1756-1758; O. O'Donovan, D. Casey, *Converting Patients' Into Consumers: Consumerism and the Charter of Rights for Hospital Patients*, Irish Journal of Sociology 1995, no. 5, pp. 43-46.

care services as well as free competition will enhance the enforceability of patients' rights also in the public sector.

The Patients' Rights Act, which is now a basic legal fundamental of patients' rights in Poland, introduces the notion of "collective patients' rights"<sup>81</sup>. This category, not unquestionable, would include for instance a right to honest medical procedure based on medical criteria and determining the priority of access to medical services in cases of limited availability, or a right to access to medical data. The provisions of the Act adapt the rules on protection of consumer collective rights to the provision of health care services. Their aim is to enhance the range of remedies available to the aggrieved patient and to remedy the deficiencies of the tort law protection. In particular, collective patients' rights are to be enforced by a special organ – the Patient Ombudsman. The Ombudsman is designed as a national organ (central administrative authority) who is competent i.a. to impose administrative fines for the violations of patients' collective rights (Article 61 of the Patients' Rights Act)<sup>82</sup>. The creation of another layer of protection of patients' rights involves a shift from fault to strict liability. Wrongfulness of the infringement is sufficient to order an injunction or an administrative fine (Article 59 sec. 2 of the Patients' Rights Act).

## VI. CONCLUSIONS

The above analysis leads to the conclusion that patients' rights merit an express rule on their pecuniary protection in order to abolish the requirement of proving that a certain right is recognized as a protected interest (which is a *conditio sine qua non* of a potential civil liability of the violator). This can be done either by including all (or almost all) patients' rights into the category of "personality rights" (interests) or by an explicit recognition of the rights and interests as a separate normative

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<sup>81</sup> Dz. U. [Journal of Laws] 2009, No. 52, item 417 and No. 76, item 641.

<sup>82</sup> Hence, it will be similar to the British model (Parliamentary and Health Commissioner). Comp. in Belgium: H. Nys, *The Belgian Law of August 22, 2002 Concerning the Rights of the Patient*, Yearbook of European Medical Law 2005, p. 100; L. Fallberg, S. Mackenney, *Patient Ombudsmen in Seven European Countries: an Effective Way to Implement Patients' Rights?*, European Journal of Health Law 2003, no. 10, p. 350; L. Fallberg, *Patient Rights in Nordic Countries*, European Journal of Health Law 2000, no. 7, p. 8.

(sub-) category, which would be subject to the same or to a similar regime of protection as the one granted to personality interests. Such recognition is of course facilitated by the international and supranational conventions and other documents. In fact, even before the Biomedical Convention came into force, a statutory regulation of patient rights had eased the position of a patient in court in many countries (e.g. Poland, Portugal<sup>83</sup>). But this did not necessarily mean that patients were granted a claim for pecuniary compensation for the infringement of their rights not associated with personal injury.

It is trivial to say that with respect to the protection of patients' rights the "law in books" does not coincide with the "law in action". The system of administration of justice has a primary impact on the insufficient enforcement of patients' rights. As a matter of fact, the average Polish patient is not aware of his rights, and most people still think that a claim for damages may be brought only in a case of medical malpractice and not when "only" dignity, autonomy, or privacy was violated by a doctor or medical personnel<sup>84</sup>. Therefore, a person who has suffered a violation of patients' rights, regardless of whether he or she has suffered any damage, should have an explicit claim for pecuniary compensation for the violation, which is separate from a claim for reparation of moral harm due to personal injury.

It remains an open question whether some patient rights should be afforded better protection. I am of the view that depending on the contents of a patient right it may be given a more extensive protection, allied with the scope of protection of the underlying personality interest (right to privacy, self determination, data protection). It is generally agreed that legal interests such as human dignity and liberty deserve a wider protection of tort law than property interests (comp. Article 2:102 Principles

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<sup>83</sup> See G. de Oliveira, *Some Improvements in the Portuguese Medical Law*, Yearbook of European Medical Law 2005, p. 101; E Hondius, *General Introduction*, [in:] E Hondius (ed.), *The Development of Medical Liability*, Cambridge, New York: Cambridge University Press 2010, p. 9 et seq.

<sup>84</sup> The protection of these values is still insignificant, although it has recently been on the increase. For the comparative results of an empirical survey in the Czech Republic see E. Krizova, *The Patients' Rights as an Important Issue in the Process of Civic Emancipation in the Czech Republic*, [in:] den Exter, Hermans (eds), supra note 2, pp. 161-162.

of European Tort Law<sup>85</sup>). For example, in France, the fault in the invasion of privacy cases is incorporated in the infringement test<sup>86</sup>, while in Poland, the wrongfulness of the invasion is presumed by law (Article 24 KC).

The complex nature of patients' rights calls for a distinction between the rights that are types of personal interests and other (non-absolute) rights. In Poland, Article 4 sec. 3 of the Patients' Rights Act narrows the protection granted to the right to safety of valuables deposited in a hospital, to the right to information about the scope and type of health care services offered by health care providers, and to the right of the patient to access to his medical record. In all three cases the aggrieved patient has no claim for a pecuniary redress.

I am strongly inclined to say that a claim for non-pecuniary loss is a most important civil sanction in cases of an infringement of patients' rights, providing a serious protection of the dignity, privacy, and autonomy of a patient, regardless of the diligence and effectiveness of a medical intervention. This solution answers the question of classifying the liability of medical professionals and institutions *ad casum* as contractual (e.g. in Germany) or tortious (e.g. Poland). It also helps to overcome problems encountered in those systems where damages for non-pecuniary loss may be awarded in specific cases (Poland, Austria), in particular only in a tort regime (this problem is alleviated in the systems that recognise the concurrence of causes of liability).

Finally, it is difficult to resist citing W. V. H. Rogers's conclusion that "the fact that [human interests] are not easily valued in monetary terms, and that their infringement may be less catastrophic for an individual than a very serious personal injury does not mean that they are unimportant, looked at from the point of view of the maintenance of a decent society"<sup>87</sup>. This thought allows me to suggest that the establishment of a pecuniary claim for a "simple", i.e. not leading to personal injury, violation of patients' rights is an idea to be accepted by all (or almost all) European systems.

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<sup>85</sup> European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien, New York: Springer 2005.

<sup>86</sup> See van Dam, *supra* note 19, p. 152.

<sup>87</sup> See Rogers, *supra* note 19, p. 294.

