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The concept of rationalising damage and the scope of insurer's liability

The concept of indirect violation of rights and interests holds an important place in the system of liability for damages. Therefore, the analysis of that subject matter should focus not on whether the damage is compensable but on the basis and extent of compensation. The diversity of events that may give rise to an "indirect damage" does not make it easy to identify its prerequisites. On top of that, the actions taken do not go in pair with harmonisation of terminology and do not lead to the introduction of one consistent liability model. An answer to the doubts arising in context of compensating for "indirect damage" is the concept of rationalising damage. It covers a set of directives that serve to determine if a given detriment qualifies as "indirect damage" and if a given person is an indirect victim. Not all violations are compensable, but only violations to legally protected interests. As a result, compensation does not cover all inconveniences, or inconveniences forming a part of risk associated with everyday life. Determination of the scope of compensating for indirect damage has a significant impact on the scope of liability of the insurer. This is the case as the model of compensation for indirect violations should be "economically efficient.

Keywords: indirect violation of rights and interests, monetary compensation, harm, insurance

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Introduction

The concept of indirect violation of rights and interests[2] holds an important place in the system of liability for damages. Therefore, the analysis of this problem should focus not on whether such damage is compensable but to what extent and on what basis this is the case, and if such violations really correspond to the concept of "indirect damage."

The concept of "indirect damage" may apply not only to a harm suffered in consequence of death of a close person or grievous bodily injury but also to a loss suffered by a stockholder as a result of a decline in the stock prices,[3] or to losses in the parent – daughter company relation. The diversity of events that may give rise to an "indirect damage" does not make it easy to identify its prerequisites. On top of that, the actions taken do not go in pair with harmonisation of terminology ("indirect damage," "ricochet damage," "indirect victim") and do not lead to the introduction of one consistent liability model.

In this context, difficulties are apparent with the assessment if the concept of indirect violation of rights and interests covers compensation for monetary damage, non-monetary damage or harm.[4] Although a major part of opinions expressed in academic literature are centred around

2. For more, see: B. Lackoroński, *Odpowiedzialność za tzw. szkody pośrednie w polskim prawie cywilnym,* [in:] *Odpowiedzialność odszkodowawcza*, [ed.] J. Jastrzębski, Warszawa 2007, p. 134, A. Chłopecki, *Szkoda poniesiona przez spółkę akcyjną a szkoda poniesiona przez akcjonariusza w świetle przepisów kodeksu spółek handlowych i kodeksu cywilnego*, „Przegląd Prawa Handlowego" 2007, p. 11, W. Popiołek, *Odpowiedzialność spółki dominującej za szkodę <<pośrednią>> wyrządzoną przez spółkę zależną,* [in:] *Rozprawy z prawa prywatnego i notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi,* [ed.] A. Dańko-Roesler, A. Oleszko, R. Pastuszko, Warszawa 2014, p. 317, L. Stecki, *Problematyka odpowiedzialności za szkodę pośrednią,* [in:] *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego*, [ed.] S. Sołtysiński, Poznań 1990, p. 295 et seq., M. Wałachowska, *Roszczenie o zadośćuczynienie pieniężne za zerwanie więzi rodzinnych w razie doznania przez osobę bliską poważnego uszczerbku na zdrowiu,* „Przegląd Sądowy" 2017, nr 9, p. 17.
3. For more, see: M. Panert, *Roszczenie odszkodowawcze z tytułu obniżenia wartości akcji*, „Forum Prawnicze" 2014, p. 36, M. Kaliński, *Szkoda poniesiona przez spółkę akcyjną a szkoda poniesiona przez akcjonariusza w świetle przepisów kodeksu spółek handlowego i kodeksu cywilnego – polemika*, „Przegląd Prawa Handlowego" 2007, nr 9, A. Chłopecki, *Szkoda poniesiona przez spółkę akcyjną a szkoda poniesiona przez akcjonariusza w świetle przepisów kodeksu spółek handlowych i kodeksu cywilnego*, „Przegląd Prawa Handlowego" 2007. See also: judgment of the Supreme Court (SN) of 22 June 2012, V CSK 338/11, Legalis No. 544275.
4. In the context of non-synonymity of non-material damage and harm, attention should be drawn to Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, which expressly provides that the scope of relevant damage in case of non-performance or improper performance of a travel package contract should also cover non-material damage. As a consequence, it is assessed negatively that the Polish legislator used the term "harm" in reference to non-material damage suffered by a traveller. The term "harm" means a non-material detriment arising from a violation of an entitled party's personal rights. On the other hand, the term "non-material damage" has a wider meaning – covering, beside harm, also situations of non-material detriments that are not consequences of violation of personal interests. See: Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ.L 326, p. 1), Act of 24 November 2017 on tourist events and related tourist services (Dz. U. 2017 poz. 2361, as amended). See also the judgment of the CJEU of 12 March 2002, Simone Leitner v. TUI Deutschland GmbH & Co. KG, C-168/00, EU:C:2002:163.

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harm,[5] bearing in mind, e.g., the possible sources of damage suffered by indirect victims, it seems more legitimate to refer compensation to broadly understood damage.

An answer to the doubts arising in context of compensating for "indirect damage" is the concept of rationalising damage. It covers a set of directives that serve to determine if a given detriment qualifies as damage, and the affected person as injured party. Not all violations are compensable, but only violations to legally protected interests. As a result, compensation does not cover all inconveniences, or inconveniences forming a part of risk associated with everyday life.

1. Indirect violation of rights and interests

Currently, there is no single model of compensating for indirect violations. In case of compensation for harm suffered in consequence of death of a close person, we have to do, on the one hand, with extensive possibilities to seek damages by family members, as provided for in French law, and, on the other hand, with the strictness of German law. Only in 2017 did the German legislator introduce § 844(3) BGB, which is a legal basis for claims for monetary compensation for death of a close person, and adopt, in the same way, the European standard. Special importance should be drawn in this context to the legal presumption of a particularly close personal relationship if the surviving person is the spouse, partner, parent or child of the deceased. The factual background for the introduction of the claim for death of a close person was an air disaster of a plane belonging to the Germanwings airline, which took place in the French Alpes in March 2015 and led to death of 150 passengers and crew members. The disaster sparked a public debate about the need to introduce appropriate legislation on the compensation of harm suffered in consequence of death of a close person in German law.

In fact, compensating for indirect violations of rights and interests is a part of European tendencies. Beside legislative activities in particular Member States, one should note the model rules laid down in the Draft Common Frame of Reference.[6] Article VI. – 2:202 of that instrument introduces compensation for non-material damage caused to a natural person as a result of bodily injury or death of another person. On the other hand, under Article 10:202(2) of the Principles of European Tort Law,[7] persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of loss of that support. Under Article 10:301, non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

The European tendencies are in line with the actions of the Polish legislator. To present them in chronological order, since 1996, a person whose personal interest has been unlawfully violated may, under Art. 448 of the Civil Code (k.c.), seek an award of an appropriate amount as monetary

5. Especially when suffered as a result of death of a close person or impossibility to continue or establish family ties.
6. R. Strugała, *Dobra i interesy chronione w strukturze czynu niedozwolonego*, Warszawa 2019, p. 119 et seq., Ch. Von Bar, E. Clive, *Principles, Definitions and Model Rules of European Private Law*, p. 3148.
7. *European Group on Tort Law, Principles of European Tort Law. Text and Commentary, Chapter 10: Damages,* Art. 10:202, U. Magnus, 2005, p. 166, E. Bagińska, *Projekt unifikacji europejskiego prawa czynów niedozwolonych*, „Państwo i Prawo" 2004, nr 6, p. 32.

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compensation.[8] In 2008, the legislator adopted the provision of Art. 446 § 4 k.c., which is a basis for claims for compensation for death of a close person.[9] Finally, in 2021, the provision of Art. 446^2 k.c. was introduced under which, in the event of causing a severe and permanent bodily damage or health disorder which results in the impossibility to establish or continue family ties, the court may award to immediate family members of the injured party an appropriate amount as monetary compensation for the harm suffered.[10] The last legislative operation, which transposed the opinions expressed in judicial practice into a legal provision, demonstrates the complexity of the question of indirect violation of rights and interests.[11]

The concept of indirect violation of the sphere of rights and interests has penetrated the system of liability for damages. In the light of the above, special attention should be paid to the specification of its prerequisites and identification criteria.

2. The concept of rationalising damage

2.1. The significance

The prerequisites of liability for damages do not permit identifying "indirect damage" or distinguishing such indirect damage from the classical damage, referred to as "direct." Neither does the concept of relative unlawfulness, which assumes that protection by a legal norm covers specific rights and interests, as a result of which it will be unlawful to violate those rights and interests that the given norm was supposed to protect.[12] Although the concept of relative unlawfulness reflects the idea of the protective purpose of a legal norm[13] and has been expressed in the practice of Polish courts,[14] it has not removed doubts concerning the compensation for "indirect damage" and the criteria of identification of such damage. Which is important from the point of view of these considerations, this conception was adopted in the German legal system (*Normzwecktheorie*, § 823(2) BGB).[15]

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8. The reform introduced by the Act amending the Act – Civil Code of 23 August 1996 (Dz.U. Nr 114, poz. 542) rephrased Art. 448 k.c. in the following way: "In the event of infringement of one's personal interests the court may award to the person whose interests have been infringed an appropriate amount as monetary recompense for the harm suffered or may, at his demand, award an appropriate amount of money to be paid for a social cause chosen by him, irrespective of other means necessary to remove the effects of the infringement. Article 445 § 3 applies."
9. The Act amending the Act – Civil Code and certain other acts of 30 May 2008 (Dz.U. Nr 11, poz. 731).
10. The Act amending the Act – Civil Code of 24 June 2021 (Dz.U. z 2021 r., poz. 1509).
11. Doubts that arise in this context relate to the qualification of family tie as personal interest, the relation of Art. 446^2 k.c. to Art. 448 § 1 k.c., the retroactive effect and the method of determining that a severe and permanent bodily damage or health disorder has been caused.
12. For more, see: M. Owczarek, *Problem bezprawności względnej w systemie odpowiedzialności deliktowej*, „Palestra" 2004, nr 5–6, R. Kasprzyk, *Bezprawność względna*, „Studia Prawnicze" 1988, nr 3, J. M. Kondek, *Bezprawność jako przesłanka odpowiedzialności odszkodowawczej,* Warszawa 2013, A. Szpunar, Glosa do orzeczenia SN z 3 marca 1956 r., „Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1959, poz. 197.
13. E. Bagińska, *Dopuszczalność dochodzenia przez osoby bliskie zadośćuczynienia w związku z doznaniem poważnej szkody na osobie przez bezpośrednio poszkodowanego*, „Iustitia" 2016, nr 2, p. 2.
14. Judgment of the Supreme Court (SN) of 13 October 1987, IV CR 266/87, Legalis No. 26001, resolution of the SN of 27 April 2001, III CZP 5/01, Legalis No. 49642, judgment of the SN of 24 September 2008, II CSK 177/08, Legalis No. 114126.
15. See also: judgment of the BGH of 25 May 2020, VI ZR 252/19, NJW 2020, 1962, beck-online, E. Bagińska, *Kompensacja krzywdy osób najbliższych w razie poniesienia przez poszkodowanego ciężkiego uszczerbku na zdrowiu – przegląd*

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The conception of rationalising damage is a tool intended to establish if a given damage is compensable, i.e., if it qualifies as indirect violation of rights and interests (in the subjective and objective dimension), and to what extent it is compensable. Importantly, this conception can successfully apply to widely understood damage – material, non-material, harm – whether "direct" or "indirect."

The traditional prerequisites of liability for damages are not sufficient and may lead to excessive extension of the boundaries of compensating damage. Therefore, they should be considered in the spirit of rationalisation of damage. The concept of rationalising damage constitutes a tool for interpreting the prerequisites so as not to disturb balance in the law of compensation.

Using the examples that will be discussed in more detail further on in this study, one can imagine a situation when a pedestrian is a witness of a car accident in which certain persons are injured – fatal victims ("directly injured parties"). As a result of shock and emotions related to that event, the witness sustains non-material damage, but does not suffer a health detriment (e.g., in the form of loss of health). Based on this example, it can be considered it the pedestrian is entitled to seek monetary compensation for the non-material damage suffered from the perpetrator of the traffic accident. Moving on to the next example, it can be considered if a person against whom, charges were brought in criminal proceedings only to be acquitted because it has been found in the evidentiary procedure that the crime was committed by another one is an injured party.

In the first place, the court should consider if the prerequisites of liability for damages have been fulfilled. If this is the case, the court should use the conception of rationalising damage, including an analysis whether or not the detriment suffered fell within a general risk associated with life.

2.2. Introduction of a conceptual network

Proper application of the concept of rationalising damage calls for alignment of terminology, at least on a rudimentary level.

The concepts of "indirect damage" and "indirect victim," used in literature of the subject and in judicial practice,[16] are an oversimplification. The use of the adjective "indirect" situates the indirect damage and the indirect victim always in relation to another, direct damage and direct victim. In fact, however, the point is that the causal factor that led to the occurrence of damage gave rise to damage of several parties even though the factor itself was directly aimed against only one of those parties. This "indirectness" relates, in the first place, to the direction and nature of the causal act and the extent to which the given interest is affected.[17] For the above reasons, assigning an indirect status to the damage and the injured party plays down their importance.

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rozwiązań europejskich, [in:] *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi*, ed. M. Pazdan, M. Jagielska, E. Rott-Pietrzyk, M. Szpunar, Warszawa 2017, p. 635.

16. Judgment of the Circuit Court in Łódź of 9 October 2013, I ACa 486/13, Legalis No. 747117.

17. B. Lackoroński, *Odpowiedzialność za tzw. szkody pośrednie w polskim prawie cywilnym,* [in:] *Odpowiedzialność odszkodowawcza*, [ed.] J. Jastrzębski, Warszawa 2007, p. 134, A. Chłopecki, *Szkoda poniesiona przez spółkę akcyjną a szkoda poniesiona przez akcjonariusza w świetle przepisów kodeksu spółek handlowych i kodeksu cywilnego*, „Przegląd Prawa Handlowego" 2007, p. 11, W. Popiołek, *Odpowiedzialność spółki dominującej za szkodę pośrednią wyrządzoną przez spółkę zależną,* [in:] *Rozprawy z prawa prywatnego i notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*, [ed.] A. Dańko-Roesler, A. Oleszko, R. Pastuszko, Warszawa 2014, p. 314

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Such conclusion is supported by the dictionary definition of the term "indirectness," which refers to a "relationship between things, concepts, quantities" or "interdependence between elements of a given set."[18] On the other hand, the term "direct" means "relating to someone or something explicitly"[19] or – in a temporal perspective – "at a moment following something or preceding something, shortly before someone or after someone, at once, immediately."[20]

Another fact not without significance is that, in German literature, the principle according to which only damages of the directly injured party – and not of the indirectly injured party – are compensable is referred to as the principle of directness (*Unmittelbarkeitsgrundsatz*)[21].

On the other hand, "indirect" damage constitutes a fully-fledged, independent damage suffered by a specific party. Dwelling on that thought, it must be highlighted that a damage should also be personal and objective.

Overuse of the form "indirect damage" can be prevented by using the term "secondary damage" instead of "indirect damage" and "secondarily injured party" instead of "indirectly injured party." One could also consider exclusive use of the term "secondarily injured party" suffering damage. Then, the centre of gravity would be shifted to a certain consequence ("secondary"), rather than relationality and dependence of damage. Finally, without prejudging this issue, it should be considered if in each and every case – as long as this terminology is adopted – the secondarily injured party will suffer secondary damage and, on the other hand, if secondary damage will occur only to a secondarily injured party.

However, it must be noted that establishment of a model of compensating for secondary damage or detriments suffered by secondarily injured parties calls for specification of prerequisites of liability. It is equally important, although going beyond the framework of this study, to determine if secondary damage is compensable under Art. 415 k.c. or if it is subject to redress only as a part of normatively specified claims, which would imply adoption of an exhaustive list of such detriments and their precise definition.

2.3. The directives of rationalising damage

As far as shock damages (*Schockschaden*)[22] are concerned, in the case-law of the Federal Court of Justice (BGH), prerequisites for their compensation were established. Shock damages are characterised by the fact that the injured party who does not participate directly in the event sustains a health detriment as a result of the experienced shock. Such detriment takes the form

18. Mała Encyklopedia PWN, Warszawa 1996, p. 739.
19. Słownik 100 tysięcy potrzebnych słów, ed. J. Bralczyk, Warszawa 2003, p. 51.
20. Uniwersalny słownik języka polskiego PWN, ed. S. Dubisz, Warszawa 2006, p. 236.
21. T. Baur, *Das Hinterbliebenengeld. Eine weitere Form des Ersatzanspruchs eines mittelbar Geschädigten?*, Hamburg 2021, p. 12.
22. For the sake of clarity, it should be pointed out that a prerequisite for asserting claims for shock damages in German law is health disorder caused by death of a close person. The injured party must demonstrate that the suffering relating to the loss of a close person reaches beyond such health violation as usually suffered by close persons, that is the injured party's own damage in the understanding of § 823(1) BGB and § 253(2) BGB. For the above reason, shock damages are qualified in the German legal order not as indirect but direct detriments. See the judgment of the BGH of 11 May 1971, BGTH 56, 163, judgment of the BGH of 10 February 2015, VI ZR 8/14, r+s 2015, No. 5, p. 260 et seq.

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of mental suffering or nervous breakdown. Shock damages are compensable subject to the following prerequisites. First, the injured party has suffered major health disorder (*Erheblichkeit der Gesundheitsverletzung*). Second, the primarily injured party was a close family member (*nahe Angehörige*). Third, the shock experienced should relate to a legitimate cause (*verständlicher Anlass).23* Fourth and finally, the harmful event does not fit into the concept of general danger and general risk associated with life (*eine Gefahr des allgemeinen Lebensrisikos).24*

The last prerequisite was established in the 50s of the XX century. In its justification, the concept of *force majeure* was referred to. As an example, it was pointed out that when we go on vacation to a country torn by war, we act at our own risk. On the other hand, when the war starts once we are in that country and this was unintended, then the situation can be considered in the context of *force majeure*[25].

Against the background of so defined prerequisites, the BGH dismissed the claim for monetary compensation for a shock damage suffered by an owner of an animal as a consequence of tragic death of a dog during a walk.[26] In the justification of the decision, it was explained that health disorder of the indirectly injured party should be pathological and requires a personal relationship with the directly injured person. The BGH concluded *a limine* that the shock suffered by the dog's owner was legitimate, however, wounding or death of an animal falls within general risk associated with life.

In the judgment of BGH of 22 May 2007, it was concluded that a driver going the wrong way was not liable for post-traumatic aggravating syndrome (post-traumatic stress disorder) of two policemen who, already off-duty, found themselves at an accident site and, without any possibility to grant aid, helplessly watched the persons trapped in the vehicles involved in the accident burn.[27] The damage following from mere presence at such events is attributed – as concluded – to general risk associated with life. This was unaffected by the attempt made to rescue the injured persons, which attempt was discontinued shortly after the vehicles burst into flames. Under Austrian law, such damage relating to a rescue attempt (*Rettungschaden* – rescue damage) is compensable provided that such claims may not be asserted by a person present at the accident site only as curious observer (§ 1295 ABGB).[28]

The OLG, in the judgment of 7 November 2023, held that although witnessing a process of care over a close relative that was considered grossly inappropriate may also give rise to a mental shock in the understanding of "shock damage," the causal link must be assessed critically to avoid unlimited liability of the tort's perpetrator.[29]

As a result, the directive of general risk associated with life is of special importance to so called shock damages. Assuming that the prerequisites of liability for damages are met when a claim is brought by a pedestrian observing a traumatic event, it is the very assessment whether a damage

23. A legitimate cause is the case when the damage of the primarily injured party takes the form of that party's death or serious detriment.
24. M. Straub, N.-J. Biller-Bomhardt, *Schockschadensersatz bei Verletzung oder Tötung eines Tieres*, Neue Juristische Wochenschrift 2021, nr 3, p. 120
25. Judgment of the OLG Düsseldorf of 15 February 1990, 18 U 225/89, NJW-RR 9/1990, p. 573.
26. Judgment of the BGH of 20 March 2012, VI ZR 114/11, Neue Juristische Wochenschrift 24/2012, p. 1730 et seq.
27. Judgment of the BGH of 22 May 2007, VI ZR 17/06, BGHZ 172, 263 – NJW 2007, 2764.
28. Ch. Huber, T. Kadner Graziano, J. Luckey, *Hinterbliebenengeld. Anspruchsgrundlagen ffl Durchsetzung ffl Muster mit Länderteil: Österreich ffl Schweiz ffl Italien ffl England*, 2018, p. 27.
29. Judgment of the OLG Dresden of 7 November 2023, 4 U 1217/23.

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falls within a general risk associated with life that can be a barrier against asserting such claims and against excessive expansion of the boundaries of compensating damage. Another example indicated in German literature is the danger of participation in criminal proceedings by being involved in in a criminal procedure (1958 r.)[30]. This kind of risk is a part of general risk associated with life.

If the above directive is considered in the context of Polish legislation, one can imagine a situation in which the injured party suffers a permanent and severe health detriment, resulting in the impossibility to continue a family tie. Then, the closest family members of the injured person may seek monetary compensation under Art. 446[2] k.c. After a couple of years, when the injured person dies as a result of the previously sustained health detriment and the situation in which that person found him-or herself, the same immediate family members of the deceased may seek monetary compensation for death of a close person (Art. 446 § 4 k.c.). Such situation cannot be ruled out, especially that the prerequisites for asserting both claims are different. In the context of the presented doubts, it can be helpful to assess if the harm suffered fits into general risk associated with life. Such assessment, in turn, may relate to a severe condition of the injured person and a very poor prognosis.

2.4. Amount of compensation

The concept of rationalising damage allows not only to establish if a given damage is compensable but also an extent to which this is the case. The mechanism of determining the amount of compensation is a pursuit of balance between the requirement to individualise each and every case, following from the right of access to court, and standardisation of the awarded amounts, which implements the principle of equality.

Judicial practice makes numerous attempts to work out directives that would allow to determine the amount of compensation.[31] Factors that should be taken into account when determining the amount of compensation are closely correlated to the relationship between the entitled party and the deceased. In case of a child's death, such factors may include: deprivation of the possibility to rejoice in the family founded by the child, to observe the child's adulthood, his or her growing up, prospects of the child's contribution to the improvement of life situation of the parents, or loss

30. Judgment of the BGH of 22 April 1958, VI ZR 65/57, NJW 28/1958, p. 1041.

31. In the first place, the assessment of circumstances of the case should be based on objective criteria, and not only on subjective feelings of the indirectly injured party. Among the factors affecting the assessment of the suffering experienced by the indirectly injured party, judicial practice points to the dramatic nature of the experiences of the close person, the feeling of loneliness and sense of emptiness after the loss, moral anguish and mental shock caused by the death of a close person, type and intensity of the tie between the injured party and the deceased, support of other close persons, age of the person entitled to monetary compensation, degree to which the injured party will be able to adapt to the new reality and the injured party's ability to accept that reality, treatment of the trauma suffered and taking pharmacological agents, as well as the age of the deceased and of the injured party. A matter not without significance is the sudden and unexpected discontinuation of the tie and the impact of the harm suffered on the physical condition of the close person, as well as the role the deceased played in the family. See the judgment of the Court of Appeal in Białystok of 29 December 2020, I ACa 646/20, Legalis No. 2554629; judgment of the SN of 20 December 2012, IV CSK 192/12, Legalis No. 607831, judgment of the SN of 30 January 2014, III CSK 69/13, Legalis No. 1092613.

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of assistance rendered by the child in the household.[32] In this context, one cannot disregard the costs necessary to maintain a child, which are of much less value to the parents than their close relation with the child. In other words, an element of closeness – beside everyday assistance, ensuring security, time spent together – is maintenance of the child.[33]

However, realising the difficulties relating to the determination of the amount of suffering and fallibility of the adopted criteria, the SN concluded, in its case-law, that – when awarding an amount of adequate compensation to the injured party – the court (in accordance with Art. 321 § 1 of the Code of Civil Procedure (k.p.c.)) should bear in mind the cases of other injured parties, including description of the factual situation and the resulting amount of damage, and the amount of compensation awarded to those injured parties.[34] In the opinion of the SN, harms of similar amount should be compensated with comparable sums, that is similar amounts of money. Such an approach implements the principle of justice. Consistence of judicial practice is also conducive to the certainty of law, the sense of justice and equality before the law.[35] In the judgment of 16 April 2015, the SN noted that – in the context of individual nature of harm – guidance, in the determination of compensation, by sums awarded for the same detriment in other cases might be limited, yet, it is not completely irrelevant. It is admissible to take into account, in the judgment, amounts awarded in other cases as long as this does not contradict the principle of the individualization of circumstances and allows to consider the specificity of the particular case.[36] A similar position was taken by the Constitutional Tribunal (TK) in the judgment of 1 March 2011, in which the Tribunal emphasized the importance of the principle of the individualization of compensation and instruments available to courts allowing to implement that principle. The TK opposed introduction of a fixed, quota limitation of liability.[37]

When it comes to compensation tariffs or measuring the detriment in percentage terms, the SN reserved that such measures are only auxiliary in cases for compensation, and that compensation has a different nature in social insurance law (lump sum) and in civil law (individualised).[38]

As far as the standardisation of relevant amounts is concerned, the National School of Judiciary and Public Prosecution implemented a research program entitled: "Standardisation of the amounts of compensation for harm caused by death of a close person (Art. 446 § 4 k.c.)". The essential

32. A. Daszewski, *Zadośćuczynienie za krzywdę w konsekwencji szkody na osobie – analiza polskiego rynku,* [in:] *Szkody osobowe kompensowane z ubezpieczenia komunikacyjnego OC. Analiza rynku*, [ed.] I. Kwiecień, Warszawa 2011, p. 200.

33. The cost of raising a child in a one-child family in 2011 approximated 254000 PLN until the age of 18, and 324000 PLN until the age of 23. In the same way, amounts specified on the basis of the upbringing costs may constitute a minimum value of the relationship between a parent and child. For more, see: I. Kwiecień, *Ekonomiczna analiza dochodzenia roszczeń o zadośćuczynienie za szkody na osobie z ubezpieczeń odpowiedzialności cywilnej*, Wrocław 2015, p. 190.

34. Judgment of the S.C. of 1 September 1967, II PR 318/67, Legalis No. 13189, judgment of the Court of Appeal in Cracow of 8 December 1992, I ACr 429/92, Legalis No. 33050.

35. Judgment of the SC of 26 November 2009, III CSK 62/09, Legalis No. 254069.

36. Judgments of the S.C. of 16 April 2015, I CSK 434/14, Legalis No. 1260024, of 30 January 2004, I CK 131/03, Legalis No. 66874.

37. Judgment of the TK of 1 March 2011, P 21/09, Legalis No. 290177.

38. Judgment of the SC of 6 May 2008, I PK 276/07, Legalis No. 170261.

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purpose of the project was to develop an IT tool that – upon entering basic parameters of the case – would provide information about the amounts of compensation awarded by courts in similar cases.[39]

On the other hand, until 2014, the Czech Civil Code,[40] under w § 444, provided for specific monetary sums. Respectively, for the spouse – 240 000 CZK, for each child – 240 000 CZK, for each parent – 240 000 CZK, for a parent as a consequence of death of an unborn child – 85 000 CZK, for siblings – 175 000 CZK, and for a close person cohabitating with the deceased at the time of the event – 240 000 CZK. Currently, under § 2959, the Code grants claims for death or severe health detriment to the spouse, parent, child or another person in close relation with the deceased.

The need can be noted to develop certain patterns and directives for the purpose of consolidating the amounts granted as compensation and, on the other hand, a tendency to consider, in each and every case, the circumstances of the particular situation. The concept of rationalising the damage should prevent excessive expansion of the boundaries of compensation – both in subjective and objective terms. The amount of compensation should be maintained within reasonable limits so that the compensation does not lead to excessive and illegitimate enrichment.

3. The scope of liability of the insurer

Liability of the insurer is a derivative of the civil liability of the perpetrator of damage, and the legal relationship between the insurer and the injured party is a "superstructure" over the compensatory relationship between the insured party and the injured person.[41] In the face of the accessory nature of the insurer's liability, it should be concluded that the existence of the perpetrator's civil liability is a necessary condition for the occurrence of the insurer's liability[42], provided, however, that the scope of liability of the perpetrator and the insurer may differ.

The question of parties entitled to assert a claim or the scope of liability continues to be vital as, already in 2009, on average four claims were reported per each event, an average amount of monetary compensation was 80000 PLN, and the total value of claims arising from one death was nearly 400000 PLN.[43]

Implementation of the directives relating to the concept of rationalising damage by the courts would be reflected already at the stage of loss adjustment procedures held by insurance companies. In the light of the recommendations on the process of determining and paying compensation for non-material damage under civil liability insurance contracts of motor vehicle holders issued by the Polish Financial Supervision Authority,[44] such directives would definitely not go unnoticed by insurers.

39. https://www.kssip.gov.pl/node/9003, last accessed on: 15 February 2024.
40. Zákon č. 89/2012 Sb, https://www.zakonyprolidi.cz/cs/2012–89, last accessed on: 15 February 2024.
41. E. Kowalewski, *Istota ubezpieczenia odpowiedzialności cywilnej*, „Prawo Asekuracyjne" 2002, No. 3, p. 6, G. Bieniek, *Cywilnoprawna problematyka ubezpieczenia OC posiadaczy pojazdów mechanicznych na tle nowych uregulowań*, „Przegląd Sądowy" 2004, nr 5, p. 46.
42. Judgment of the Court of Appeal in Cracow of 22 January 2013, I ACa 1331/12, Legalis No. 736450.
43. M. Monkiewicz, *Kompensacja szkód osobowych z ubezpieczenia komunikacyjnego OC w Polsce i w wybranych krajach – analiza ekonomiczna,* [in:] *Szkody osobowe kompensowane z ubezpieczenia komunikacyjnego OC. Analiza rynku*, [ed.] I. Kwiecień, Warszawa 2011, p. 160.
44. Recommendations of the Polish Financial Supervision Authority on the process of determining and paying compensation for non-material damage under civil liability insurance contracts of motor vehicle holders from June

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In literature, the importance is emphasised of individual loss models, for the development of which it is necessary, in the first place, to understood the characteristics of claims and to gather specific and sufficient data.[45] Such data cover all factors determining the development and characteristics of a claim (used by the persons dealing with claim processing for the assessment and processing of claims). Individual loss models will lead to an improvement in the quality and better understanding of the claim portfolio and of the business model. Economic tools can be used not only for the analysis of the evolution of legal solutions but also of the consequences of implementing those solutions. Legal provisions should resolve what kind of damages should be compensated (objective approach), by what means this should be done (structural approach), and what the scope of liability should be (subjective approach).[46] Tools offered by law and economics, having major importance from the point of view of the insurer's liability, serve to develop solutions that will minimize costs.

Conclusions

Compensation of harm (as something difficult to monetarise) has always raised more doubts than compensation of material damage. If we assume that compensation of harm is a certain exception within the system of liability for damages, then recognition of "indirect damage" is another exception to general rules.

The concept of rationalising damage does not modify the prerequisites of liability for damages by themselves, however, it affects the understanding of those prerequisites and shows the functions of that liability. Certain situations are inherent to human nature and are not subject to compensation.

Careful analysis of case-law leads to the conclusion that the conception of rationalising damage is applied in practice, however, it is not expressed in explicit terms. From this perspective, it is worth noting the considerations of the Court of Appeal in Białystok examining if a human-dog bond constitutes a personal interest.[47] It was emphasised that although the bond between a human and animal can be a source of values to the former, it cannot be considered an exceptional, objectively existing universal value related to human nature and protected by legal provisions on the protection of personal interests. Although, as concluded by the Court, in consequence of death of their dog, the claimants experienced distress, sadness and gloom, it would not be possible to speak of such personal interest as emotional bond with an animal, including a dog. It can be noted that in matters where the prerequisites of liability for damages have been fulfilled, however doubts are aroused by the nature of the claim in the context of the boundaries of liability for damages, the conception of rationalising damage will apply. In case of a pedestrian who was an eye witness

2016, https://www.knf.gov.pl/knf/pl/komponenty/img/Rek_dot_procesu_ustalania_i_wyplaty_zadoscuczyn_z_tyt_szkody_niemajatkowej_z_umowOC_posiadaczy_pojazdow_mech_47349.pdf, last accessed on 10 February 2024.

45. M. Wiedemann, D. John, *A practitioners approach to individual claims models for bodily injury claims in German non-life insurance,* ZVersWiss (2021) 110:225–254.
46. N. Baranowska, *Ekonomiczna analiza odpowiedzialności odszkodowawczej*, „Acta Erasmiana III. Prace prawnicze", eds. M. Sadowski, P. Szymaniec, Wrocław 2012, p. 43.
47. Judgment of the Court of Appeal in Białystok of 13 January 2021, I ACa 289/20, Legalis No. 2554762.

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of a car accident or – even more so – fear upon seeing a spider[48] or stumbling of a policeman when chasing a criminal, which gave rise to a health detriment[49], the discussed concept may also apply.

In the light of the above, the conception should widely apply at the stage of the loss adjustment process. This is the case as the model of compensation for indirect violations should be "economically efficient."

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Koncepcja racjonalizacji szkody a zakres odpowiedzialności ubezpieczyciela

Koncepcja pośredniego naruszenia praw i interesów zajmuje istotne miejsce w systemie odpowiedzialności odszkodowawczej. Dlatego analiza tego zagadnienia powinna zostać skoncentrowana nie wokół tego, czy szkoda ta podlega kompensacji, ale w oparciu o jaką podstawę i w jakim zakresie. Różnorodność zdarzeń, mogących stanowić źródło „szkody pośredniej" nie ułatwia wyodrębnienia jej przesłanek. Dodatkowo, podejmowanym działaniom nie towarzyszy ujednolicenie siatki pojęciowej ani wypracowanie jednego, spójnego modelu odpowiedzialności. Odpowiedzią na pojawiające się wątpliwości związane z kompensacją „szkody pośredniej" jest koncepcja racjonalizacji szkody. Obejmuje ona

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zbiór dyrektyw, służących do ustalenia, czy dany uszczerbek wpisuje się w pojęcie „szkody pośredniej", zaś osoba, czy jest podmiotem pośrednio poszkodowanym. Nie wszystkie naruszenia podlegają kompensacji, lecz tylko naruszenie prawnie chronionych interesów. Naprawieniu nie podlegają zatem wszelkie niedogodności czy też takie, które wpisują się w ryzyko dnia codziennego. Ustalenie zakresu kompensacji szkody pośredniej ma istotny wpływ na zakres odpowiedzialności ubezpieczyciela. Model kompensacji pośredniego naruszenia powinien być bowiem „ekonomicznie efektywny".

Słowa kluczowe: pośrednie naruszenie praw i interesów, zadośćuczynienie, krzywda, umowa ubezpieczenia, odpowiedzialność odszkodowawcza.

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