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Compensation for moral harm caused to a legal entity – does the new Polish Supreme Court resolution of 2023 provide a remedy for the Polish legal system? Some critical remarks in a comparative perspective

In the resolution of 2023 the Polish Supreme Court ruled that legal entities are entitled to claim for compensation for moral damage in a case of violation of personal interests. Although the judgement is of great practical value and very interesting from the theoretical point of view, the court's justification may raise more doubts than provide answers to the question whether it is justified to grant compensation for moral harm caused to legal entities. With the comparative analyses of the topic the author of this article aims at finding the answer whether the arguments provided by the Supreme Court shall be recognized as convincing and, as such, shall be approved.

Keywords: non-pecuniary damage, moral harm, personal interests, legal entity, compensation

Introduction

Although the issue of compensation for moral harm caused to physical persons was broadly commented both in Polish¹ and foreign doctrine², the possibility of compensation for non-pecuniary

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1. See. M. Wałachowska, *Zadośćuczynienie pieniężne za doznaną krzywdę*, TNOiK 2007; A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, Oficyna Wydawnicza Branta 1999.
 2. H. Koziol, *Harmonisation and Fundamental Questions of European Tort Law*, Vienna Sramek Verlag 2017 p. 90.

damage caused to a legal entity still raises much controversy.³ The problem of granting compensation for moral damage [non-pecuniary damage] caused to legal entities is difficult and complex, as it concerns not only tort law, but also commercial and constitutional law, and to some extent human rights.⁴ It might seem that the case *Comingersoll SA v Portugal* [35382/97] heard by The European Court of Human Rights (ECHR) opened up the possibility for legal persons to seek redress for moral harm, as it is believed that the European Convention on Human Rights is “a living instrument” and, as such, must be adapted to current conditions.⁵ The tendency to follow the rules established by ECHR can be observed in foreign case law.⁶ Although most of the European courts recognize the existence of personal interests (rights) of legal entities, in some legal systems the claim for compensation for non-pecuniary harm is still not allowed.⁷

In one of the most recent judgments, of 3rd October 2023, the Polish Supreme Court (Sąd Najwyższy, SN)⁸ entitled legal entities to claim compensation for moral damage. Although the judgment is of great practical value and very interesting from the theoretical point of view, the court’s justification still may raise many doubts. With the comparative analyses of the topic this article aims at finding the answer whether the arguments provided by the Supreme Court shall be recognized as convincing and, as such, shall be approved, and whether the debate on this matter shall be still ongoing.

II. The recognition of a claim for compensation for non-pecuniary damage caused to legal entities by the violation of personal interests in European domestic systems

The foreign doctrine on the issue of compensation for moral harm caused to legal entities is divided. Some authors claim that the means of protection for natural persons and legal entities shall be on the same level.⁹ Others indicate that the compensation for moral damage shall be granted only in a case of pain and suffering and, as a consequence, awarding the compensation to legal entities creates unnecessary fiction and indeed shall be recognized as punitive damages.¹⁰

3. For broad research on the compensation for non-pecuniary damage caused to legal entities see: V. Wilcox, *A company’s Right to Damages for Non- Pecuniary loss*, Cambridge University Press 2016.
4. On the ECHR and ECJ case law see: O. Pavelek, D. Zajickova, Compensation for non-material damage caused to legal entities in the decision-making practice of the CJEU and the ECHR, *Juridical Tribune*, Vol. 13, No. 3, pp. 331–345.
5. Piet Hein van Kempen, *The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?* [in:] *Corporate Criminal Liability*, Springer 2011, p. 359.
6. H. Koziol, *Harmonisation and Fundamental Questions of European Tort Law*, Vienna Jan Sramek Verlag 2007, p. 90., *V Wilcox*, *A Company’s Right to Damages for Non – Pecuniary Loss*, p. 178.
7. B.A. Koch, *Collective Damage. Comparative Report*, [in:] *Digest of European Tort Law*, vol. 2, *Essential Cases on Damage*, eds. B. Winiger, H. Koziol, R. Zimmermann, De Gruyter 2011, p. 1033.
8. File No. III CZP 22/23, available at: www.sn.pl [accessed 11.04.2024].
9. H. Koziol, *Basic Question on Tort Law from Germanic Perspective*, Jan Sramek Verlag 2015, p. 118.
10. O. Moréteau and A.D. On, *France* [in:] *European Tort Law 2012*, p. 249. More on the punitive damages see: I. Adrych Brzezińska, *Punitive damages: czyli o odszkodowaniu karnym w prawie amerykańskim oraz europejskiej debacie na temat funkcji odpowiedzialności odszkodowawczej*, *Transformacje Prawa Prywatnego*,

A very broad analysis on the subject of compensation for non-pecuniary harm was presented by V. Wilcox in her thorough and comprehensive study “A company’s Right to Damages for Non – Pecuniary loss”.¹¹ In her conclusion referring to foreign legal systems she distinguished four different views. According to the first one the reparation of damage shall take place only in the case of personal injury or in the case of interference with the personal sphere. The second one states that generally corporations cannot suffer moral harm, so the claim shall be dismissed. The third one holds that legal entities should be given the opportunity to compensate for non-personal injury, as required by the principle of equality. The last one refers to the “personality” of legal person, and as the latter relates not only to pecuniary sphere of the entity, the compensation shall be justified.¹² The research conducted by V. Wilcox indicates that there is no unanimous position in foreign domestic legal systems. As the main aim of this article is to estimate the position taken by the Polish Supreme Court, some additional remarks on the possibility of granting compensation for moral harm must be noted below.

In Germany, the personal interests of a legal entity are recognized and, as such, protected by law.¹³ Nonetheless, the possibility of granting compensation for non-pecuniary damage in a case of infringement of personal interest of legal persons was consequently rejected by the German doctrine and jurisprudence.¹⁴ The claim for compensation for non-pecuniary damage does not refer to legal entities as the goods (interests) listed in Art §253 (2) BGB (Bürgerliches Gesetzbuch) are restricted only to natural persons.¹⁵ In the judgment of OLG Frankfurt a. M.¹⁶ it was indicated that **legal entities have no psyche and cannot feel the satisfaction, thus no compensation for moral damage shall be awarded.** In the German system, the clear distinction between pecuniary and non-pecuniary damage must be underlined, therefore the stance of German courts on this matter is very strict. Generally, if there is a violation of personal interests of a corporation, only the ensuing pecuniary damage can be repaired.¹⁷ This position seems to be logical. **As long as corporate entities cannot suffer, no compensation for moral damage shall be granted. Nevertheless, if the violation of the personal interest of a legal entity results in pecuniary damage, that kind of damage is subject to compensation, even if the damage is difficult to estimate.**

The similar point of view was presented by the English courts. In the case of *Jameel v Wall Street Journal Europe SPRL*¹⁸, it was pointed out that the good name of the company has **economic value**. As K. Oliphant notes, such recognition already raises the question of whether, since this

4/2020, pp. 4–54, E. Büyüksagis, I. Ebert, R.C. Meurkens, F. Quarta, *Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism*, European Business Law Review, Vol.27, Issue 1 (2016) pp. 137–157.

11. Cambridge University Press, Cambridge 2016.

12. V. Wilcox, op. cit. p. 180.

13. S. Marten, R. Zimmermann, Germany [in:] *Digest of European Tort Law*, Vol. 2, Essential Cases on Damage, eds. B. Winiger, H. Koziol, R. Zimmermann, De Gruyter 2011, p. 1006.

14. R. Rixecker, Anhang zu §12. Das Allgemeine Persönlichkeitsrech. Münchener Kommentar zum BGB, rn 375, 9 Auflage 2021, Beck online.

15. H. Koziol, *Basic Question of Tort Law from Germanic Perspective*, p. 117.

16. OLG Frankfurt a.M., Urteil vom 18.03.2013 – 1 U 215/11.

17. *Bundesgerichtshof* only in one case exceptionally recognized the right to compensation for non-pecuniary damage and compensation for such damage to a religious association, see: S. Marten, R. Zimmermann, Germany [in:] *Digest of European Tort Law*, p. 1006.

18. [2006] UKHL 44 [2007] 1 Ac 359.

good has economic value, the company's interest can be qualified as non-pecuniary damage.¹⁹ Generally, such damage is not compensable due to the inability of a legal entity to suffer pain.²⁰

What is common for the German and English positions on the compensation for the violation of personal interests is the conclusion that legal entities are unable to feel pain and suffering. Nonetheless, if the violation of interests of a legal entity results in pecuniary damage the latter shall be compensated. To some extent the view was also shared in **Bulgarian case law. For comparison**, in the judgment of Sofia District Court of 17th August 2017²¹ the court granted compensation for violation of personal interests. As *V. Tokushev* indicates, it was the first judgment in Bulgarian jurisprudence according to which the compensation for non-pecuniary harm caused to legal entity was granted.²² The court referred to the European Court of Human Rights and the Court of Justice of the EU case law. The claim was based on Arts 76a and 76 of Trade and Geographical Indications Act and Art. 631 of the Commercial Act, which govern the provisions on the compensation for non-pecuniary harm. The opposite view was presented in the judgment of Sofia City District Court of 4th January 2018.²³ In the referred case the court dismissed a foundation's claim for compensation for non-pecuniary damage. It was upheld that the provision of Art. 631 of the Commercial Act cannot be applicable to a foundation. According to the court's view, a legal person can feel no pain and, therefore, the claim for compensation shall be dismissed. As the Bulgarian doctrine indicates, the main difference between the first and the second case is that in the first judgment the damage was of a commercial nature, and in the second one was not.²⁴ **As long as there is violation of personal interests of commercial legal entities, which are governed by the Commercial Act, the compensation for non-pecuniary harm is allowed due to the provision of Art. 631, otherwise the claim shall be dismissed.** It leads to the conclusion that there must be a clear provision which constitutes a separate ground for the claim for compensation of moral damage caused to legal entity.

A liberal view on the concept of compensation for non-pecuniary damage caused to legal entities can be found in the French case law. In the case of Cour de cassation, *Chambre Commerciale* dated May 15th 2012²⁵ the French court for the first time recognized the right of a company to claim compensation for moral damage. Unfortunately, despite the recognition of this right no definition of moral harm of a legal entity was provided. The French doctrine is divided on this matter. Some scholars indicate that a legal entity cannot suffer pain or negative emotions and, as a result, there is no non-pecuniary damage.²⁶ The Cour de cassation's justification was also rejected by O. Moreteau and A.D. On. They indicate that the recognition of the possibility of granting compensation for moral damage to legal entities introduced a kind of compensation which is punitive in its nature

19. K. Oliphant [in:] *Basic Question of Tort Law from Germanic Perspective*, p. 392.

20. *V. Wilcox*, op. cit., p. 172.

21. No. 195371, commented by V. Tokushev, *Bulgaria* [in:] *European Tort Law Yearbook 2018*, De Gruyter 2019 pp. 62–63.

22. Op cit. p. 63

23. No 38, cc. No 9910/2–17, commented by V. Tokushev, *Bulgaria* [in:] *European Tort Law Yearbook 2018*, De Gruyter 2018, pp. 64–65

24. Op. cit. p. 64

25. No. 11–10278, Bull IV No. 101, D. 2012, commented by O. Moréteau and A.D. On, *France* [in:] *European Tort Law 2012*, De Gruyter 2013, eds. K. Oliphant, B.C. Steiniger, pp. 247–249

26. See. O. Moreteau, *France. Part III* [in:] *Basic Questions of Tort Law from Comparative Perspective*, ed. H. Koziol Jan Sramek Verlag, Vienna 2015 with his reference to: M. Planiol et G. Jbtipert, *Traité pratique de droit civil français*, Tome VI: Obligations, première partie, par P. Esmein, 1952, No. 552

to the French system. Interestingly, they suggest that instead of damages, the system shall opt for some injunctive remedies aimed at preventing the harm.²⁷

A similar position was presented by the Swiss Federal Court²⁸, which entitles the legal entities to claim compensation for non-pecuniary harm on the grounds of Art. 49 Code of Obligation. The court pointed out that the protection of personal interests of legal entities had evolved and is not based on the same features that the protection of natural persons. In a case of violation of personal rights of legal entities, the harm cannot be recognized as emotional distress, but shall be a subject of compensation. As P. Loser indicates, the judgment strengthens the position of legal entities and “[...] in cases of purely immaterial loss or in cases where it is impossible to prove material loss, associations have an instrument at hand to take action against the violation of their honour and reputation”.²⁹ The need of protection at the same level as natural persons can be also observed in the Austrian law, where, according to the courts, the grounds for compensation for non-pecuniary damage can be found in §16 (2) UWG – Bundesgesetz gegen den unlauteren Wettbewerb BGBl 1984/447 (Austrian Federal Law against Unfair Competition) and §8 (3) MRG – Mietrechtgesetz.³⁰ For comparison, in Slovenia, the grounds for redress of non-pecuniary damage can be found strictly in Art. 183 of Obligations Code according to which “The Court shall award a legal person just monetary compensation for the defamation of reputation or good name, independent of the reimbursement of material damage, if it finds that the circumstances so justify, even if there is no material damage”.³¹ The wording of the provision clearly provides the ground for compensation for legal entities.

IV. The position of the Polish doctrine and Polish case law on the means of protection in a case of violation of personal rights of legal entities

The catalogue of personal interests of natural persons was expressed in Art. 23 of the Polish Civil Code (Kodeks Cywilny³², KC) and is open in nature.³³ The grounds for protection of personal rights

27. O. Moréteau and A.D. On, op. cit., p. 249

28. Schweizerisches Bundesgericht, 11 April 2012, BGE 138/2012 III 337, commented by P. Loser, *Switzerland* [in:] *European Tort Law 2012*, De Gruyter 2013, eds. K. Oliphant, B.C. Steiniger, p. 712–714

29. P. Loser, *Switzerland* [in:] *European Tort Law 2012*, p. 714

30. H. Koziol, *Basic Questions of Tort Law from Germanic Perspective*, p. 117

31. Translation provided by L. Koman Perenic, *Slovenia* [in:] *European Tort Law. Basic texts*, 2nd edition, Jan Sramek Verlag 2018, p.343.

32. Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, Dziennik Ustaw [Journal of Laws] 2023, item 1610 as later amended.

33. According to Art. 23 KC: “The personal interests of a human being, in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of home, and scientific, artistic, inventor’s and rationalizing activity, shall be protected by civil law independent of protection envisaged in other provisions.”

can be found in Arts. 24³⁴ and 448 KC³⁵ which provide the pecuniary and non-pecuniary means of protection in a case of violation of personal interests. According to Art. 43 of KC “The provisions pertaining to the protection of the personal interests of natural persons shall apply correspondingly to legal persons.” Due to unclear construction of Art. 43, which does not indicate to what extent the provisions regarding the protection of personal interests of natural persons shall be applied to legal entities, both Polish doctrine and jurisprudence lack a unanimous view on the possibility of awarding damages for non-pecuniary harm of legal entity.

According to the prevailing view, there should be no restriction on the scope of means of protection in case of violation of personal rights, irrespective of the nature of the goods, i.e. whether it refers to legal entities or natural persons.³⁶ The view is supported by the argument that the damage shall be recognized as the mere fact of violation of personal interests, which does not result in pecuniary damage.³⁷ Opponents restrict the scope of non-pecuniary harm to moral harm (Polish *krzywda*), arguing that legal entities cannot feel the pain and suffering, and the claim for compensation for moral harm is restricted only to human beings.³⁸ The argument is strengthened by the view that, in fact, the aim of the compensation for a legal entity for non-pecuniary harm would be to compensate damages that are difficult to quantify.³⁹ The first position was adopted by the Polish Supreme Court.⁴⁰ What is interesting, the second one was presented in lower instance courts.⁴¹ The Supreme Court in its resolution of 2023 attempted to answer the question of whether a legal person can suffer non-pecuniary harm and, if so, what the extent of damage to be compensated is (see the references below).

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34. Art 24. §1 Whosoever’s personal rights are threatened by another person’s action may demand that the action ceases, unless it is not unlawful. In the case of infringements already committed, he may also require the wrongdoer to remove the results of the infringements and in particular to make an appropriate declaration in an appropriate form. Pursuant to the rules of this Code, he may also **either** claim compensation for non-pecuniary loss **or** demand that the wrongdoer pay an appropriate sum of money to a specific social cause.
35. Art 448 § 1. In the case of an infringement of personal interests, the court may, independently of other measures necessary to remove the results of the infringement, either award the injured person an appropriate sum as compensation for non-pecuniary harm or award (at his request) an appropriate sum to a social cause chosen by him.
- § 2. In the cases specified in Article 445 § 1 and 2 and Article 446², the person whose personal interest has been infringed may, in addition to (irrespective of) monetary compensation for non-pecuniary harm, demand that an appropriate sum of money be awarded to a social cause chosen by him.
- § 3. Article 445 § 3 shall apply to the claims referred to in § 1 and 2 above.
36. A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, p. 209, M. Wałachowska, *Zadośćuczynienie pieniężne za doznaną krzywdę*, TNOiK, 2007, p. 178; M. Safjan [in:] *Kodeks cywilny. Tom I. Komentarz. Art. 1–449*¹⁰, Wyd. 10, ed. K. Pietrzykowski, C.H. Beck 2020, No. 5., Legalis [electr.]
37. A. Szpunar, *Zadośćuczynienie*, p. 68.
38. J. Jastrzębski, *Kilka uwag o naprawieniu szkody niemajątkowej*, Palestra nr 3–4/2005, p. 42, A. Śmieja [in:] *System Prawa Prywatnego. Prawo zobowiązań. Część ogólna*, t. 6, C.H. Beck 2018 p. 757.
39. A. Śmieja, op. cit. p. 872
40. See: SN 15th December 1975, I CR 887/75, SN 9th November 2017, III CZP 43/17 (OSNC 2018 No. 5 item 49)
41. Judgment of Courts of Appeals in Cracow, 8th September 1999, I ACa 464/99.

V. The arguments provided by the Polish Supreme Court Resolution of 2023, file No. III CZP 22/23.

The facts of the case were quite simple. X posted a negative opinion about the company's business conduct alleging, i.e. that the company sells poor quality products. The company sued X for violation of personal interests (rights), demanding *inter alia* the payment of compensation for moral damage in the amount of PLN 22,000. The first instance court upheld the claim, awarding compensation in the amount of PLN 5,000. The respondent appealed. The Court of Appeals raised doubts as to whether a legal person can claim compensation for the moral damage and asked a preliminary question to the Supreme Court: "Can a legal entity demand that a person who has violated its personal interests pay compensation for the moral harm it has suffered under art 448 of the Civil Code in conjunction with Art. 43 of the Civil Code?". The Supreme Court ruled that the provisions of Art. 48 KC (compensation in case of violation of personal interests) apply accordingly to legal entities (Art. 43 KC), which justifies the award of compensation for non-pecuniary harm caused to a legal entity.

The resolution is long and the line of arguments sometimes chaotic. In order to make it easier for the reader the arguments provided in the justification will be presented in three sections: 1) personal interest of a legal entity, 2) the concept of non-pecuniary harm caused to a legal entity and 3) the non-pecuniary and pecuniary means of protection.

1. The personal interests (rights) of a legal entity. First of all, the Supreme Court pointed out that in the light of the case law of the highest instance, the provisions on the personal interests of natural persons and the means of their protection apply to legal entities (accordingly to Article 43 KC). Unlike the interests of natural persons, whose interests are immanent to a human being, **the personal interest of legal persons are to be understood as non-material values that enable a legal person to function in accordance with its scope of activities.** Since the interests of natural and legal persons are not the same, they perform different functions. In addition, the Supreme Court stressed that the assessment of the personal interest of legal persons should be made objectively, irrespective of the subjective elements of feeling that take place if the personal interest of natural persons is violated. The Supreme Court pointed out that a distinction should be made between violations of the interests of legal persons, and the interests of natural persons who are members of a legal entity. **A legal entity is a separate entity, and therefore the violated rights affect the entire substrate of the legal entity, not the natural persons who are its members.**

In further consideration, the trial court found that Art. 43 KC also refers to Art. 23 KC (catalogue of personal interests of natural persons). As a result, it should be noted that legal persons can be considered to have personal interests. The court noted that a statement that legal entities have personal interests is a simplification, as it is more correct to say that "civil law grants protection to certain 'values' of a non-material nature, which have significance not for an individual person, but for a certain separate legal entity". The Supreme Court added that if a legal person is recognized as an entrepreneur, there is a clear connection between certain personal interest and the pecuniary sphere of the entity.

According to the Supreme Court, the personal interests of legal entities are non-material values that **enable a legal entity to function in accordance with the scope of its activities.** In addition, it was pointed out that Art. 43 KC is blanket in nature and does not indicate what interests are subject to protection, and since Article 23 KC is an open catalogue of personal interests, the catalogue of personal interests

of legal entities is also open. However, some personal interests of natural persons have no counterpart among the goods of legal persons, while others do. For example, the equivalent of name and surname is the good name or business name of a legal person or other identifying marks of a legal person, while the equivalent of personal freedom, is the freedom to conduct business. The counterpart of honour, on the other hand, has been identified as the good name, reputation of a legal entity or goodwill.

The Supreme Court pointed out that the most common personal interest of a legal entity is considered to be the good reputation (good name) of the legal entity. Violation of this interest occurs in the case of negative opinions, which – objectively assessed – can lead to the loss of trust, which is essential for its functioning.

According to the Supreme Court, the scope of personal interest of legal entities in the jurisprudence is broad, and the possibility of claiming protection, including compensation, on the basis of Art. 448 KC shall be applied. Based on Art. 43 KC, the provisions on the protection of personal interests of natural persons shall be applied accordingly, there is no limitation on the means of protection for a legal entity.

2. The concept of “moral (non-pecuniary) damage. From further consideration, it is worth noting those arguments of the court that define the concept of non-pecuniary harm of legal entities. **According to the Supreme Court, the concept of harm indicated in Art. 448 KC does not exclude the application of this provision to legal entities, since the concept of harm cannot be equated solely with the experience of physical and mental suffering.** The Supreme Court pointed out that: ‘for obvious reasons, legal entities do not experience either physical or mental suffering, but they suffer non-pecuniary damage as a result of the violation of their personal rights, which cannot be measured in money’. As a further argument justifying the award of compensation to a legal entity, the Supreme Court pointed out the functions of compensation, stressing that it does not only have a compensatory function, but also a satisfying, repressive and preventive-educational one. The Supreme Court cited the Resolution of the Supreme Court of November 9, 2017, according to which Art. 448 of the Civil Code applies through Art. 43 KC also to claims for compensation asserted by legal entities in case of violation of their personal rights.⁴²

The Supreme Court stressed that legal entities by their very nature cannot suffer harm, but the functions of compensation support the need to grant them such compensation. The claim for compensation has a compensatory function, but also a satisfying, repressive, preventive and educational function. The essence of compensation is understood as the protection of the objectively understood interests of a legal person related to its personal interests, and the extent of the damage suffered in the sphere of those interests is the measure of the desirability and amount of compensation.

The Supreme Court referred to other judgments indicating that a legal person can suffer non-material damage. The court pointed out that there is a doctrinal view according to which a legal entity is entitled to claim compensation, due to construction of the provision of Art. 448 KC, according to which the term “injured party” was replaced in 1996 by the phrase “one whose personal interest has been violated.” Again, in its argumentation the Supreme Court stressed that the purpose of compensation is to protect the objectively understood interests of a legal person. The court also noticed that the possibility of granting compensation for non-pecuniary damage was recognized by ECHR.

42. III CZP 43/17 [OSNC 2018, No. 5, item 49].

In addition, the Supreme Court pointed out that doubts arise to the interpretation of the appropriate application of Art. 448 KC. The main argument against its application to legal entities is the use by the legislator of the concept of moral harm, because the harm is considered to be pain and suffering resulting from the violation of a person's personal interests. Such a definition of harm cannot be applied to legal entities, however, referring to linguistic and systemic interpretation, according to the 1996 amendment of Art. 448 KC, the concept of the injured party was replaced by the concept of "the one whose personal good has been violated," so this corresponds to the wording of Art. 24 KC. The Supreme Court pointed out that there is no statutory definition of moral harm in the Civil Code. According to the Supreme Court, it was necessary to refer to the meaning of "moral harm" in colloquial language, and therefore this concept in the context of Art. 448 KC has a broader meaning than on the basis of case law in the context of individuals, because it should be understood as: moral, physical or material damage caused to someone wrongfully, unlawfully.

In the context of the violation of personal interests of a natural person, the court pointed out that harm includes not only the mental suffering of the injured party, but also other negative non-material effects, such as the formation and maintenance of false information in the minds of the public. For these reasons, the court should take into account not only the subjective feelings of the injured party, but also the objective perception of harm in social terms. Therefore, harm should be understood more broadly than the physical and mental feelings of a person. As an example SN mentioned the situation of people in a coma, who may claim compensation for moral damage.⁴³

The Supreme Court pointed out that in order to assess whether there is a violation of the personal interest of a legal entity and whether it has suffered harm as a result of this violation, it is necessary to use objective criteria, and not subjective criteria (the sphere of internal human experiences). Therefore, moral harm in the context of Art. 448 KC should be understood as damage of a non-pecuniary nature resulting from the violation of the personal interest of a legal person. Such damage may also be suffered by a legal entity, whereby harm should be understood as a non-pecuniary damage consisting in the inability or impediment to the proper conduct of its business as before. Consequently, compensation for a legal entity is not intended to provide satisfaction or compensate for its physical and mental suffering, but the purpose is to protect its objectively understood interests related to its personal interests.

According to the Supreme Court: "Violation of the personal interests of a legal person of fundamental (key) importance for its functioning will usually mean that the person suffers harm (non-pecuniary damage). Referring to the compensatory function of compensation, the Supreme Court pointed out that the award of compensation should serve the conduct of the legal person's business, "and in this sense, it fulfils a compensatory function in the event of violation of the personal interests of a legal entity, seen as intangible assets without which it cannot conduct its statutory activities."

3. Means of pecuniary and non-pecuniary protection. The Supreme Court noted that the protection of the personal property of legal persons differs from the protection of the property of natural persons in that, with regard to legal persons, the negative consequences at the pecuniary level should be emphasized. The Supreme Court pointed out that there is no argument to differentiate the situation of natural and legal persons in the event of violation of personal interests. Those entities should be afforded the same level of protection. The Supreme Court pointed out that in the doctrine

43. SN 16th April 2015, I CSK 434/14.

there is a prominent view, according to which Art. 24 KC does not formulate the concept of non-pecuniary harm, so in the context of a legal person its equivalent should be found.

Further, it was stated that according to the rule of interpretation of the law *lege non distinguente nec nostrum est distinguere*, it includes all the provisions of the Civil Code defining the means of protection of personal interests of individuals, i.e. both non-pecuniary (termination of infringement, removal of consequences) and pecuniary (compensation for pecuniary and non-pecuniary damage, payment of a sum for a social purpose). According to the Supreme Court, since the provision of Art. 43 of the Civil Code is cross-referential in nature, and there is no express exclusion of certain means of protection, all these means should be applied.

The Supreme Court indicated that the application of Art. 448 KC to an individual is non-mandatory, so greater caution should be exercised in the context of applying this compensation for non-pecuniary harm to legal entities. The Supreme Court stressed that in order to award compensation, the court should take into account the type of business conducted by the legal entity, the personal interest that was violated, the scale of the violation and, consequently, the degree of impact on the conduct of the legal entity's business. In the case of legal entities conducting business, in the event of violation of personal interest, the effects of the violation will affect the pecuniary sphere, so it seems more appropriate to apply in addition to non-material protection measures (Art. 24§1 KC sentence 1 and the second sentence) and property protection measures provided for in Art. 24§2 KC. On the other hand, for non-business legal entities, the violation of their personal property does not cause pecuniary damage, but may prevent them from conducting their current business and justify Art. 448 in conjunction with Art. 43 of the Civil Code.

Finally, the Supreme Court pointed out that it is arguable that the application of Art. 448 in conjunction with Art. 43 of the Civil Code could lead to the limitation of freedom of expression. However, according to the court, this only constitutes an argument against the non-application of these provisions in specific factual situations.

V. Remarks on the Polish Supreme Court Resolution

First and foremost, as there is no legal definition of damage in the Polish legal system, two doctrinal positions developed regarding the concept of damage. According to the first one: damage is a mere violation of a given good or interest protected by law. The second view restricts the damage to the consequences of a certain event.⁴⁴ In the traditional concept of non-material damage, it includes negative experiences of the injured party in the form of mental and physical suffering⁴⁵, thus the moral harm shall be qualified as a personal injury.⁴⁶ Relating to the non-pecuniary damage, the second view prevails. It should be added that already in the Polish 1933 Code of Obligations, the circumstances of awarding compensation for non-pecuniary harm were strictly provided and they referred to personal injury.⁴⁷

44. M. Kaliński, *Szkoda na mieniu i jej naprawienie*, C.H. Beck 2014, p. 170.

45. M. Kaliński, [in:] *System Prawa Prywatnego*, t. 6: *Prawo zobowiązań – część ogólna*, ed. A. Olejniczak, C.H. Beck INP PAN 2018, p. 93.

46. A. Śmieja [in:] *System...*, p. 758.

47. Z. Radwański, *Zadośćuczynienie pieniężne za szkodę niemajątkową. Rozwój i funkcja społeczna*. Państwowe Wydawnictwo Naukowe 1956, p. 166.

The solutions were followed in the Civil Code of 1964. The main purpose of compensation for moral damage is to alleviate the harm suffered. **When we look at the traditional definition of moral damage (pain and suffering), we can say that only that type of non-pecuniary damage shall be compensated,** as the legislator so far does not recognize any other type of non-pecuniary harm.

It is not clear whether the Supreme Court understands the damage as a mere fact of violation or as a result of the violation. On the one hand, Supreme Court provides that: legal entities “suffer non-pecuniary damage as a result of the violation of their personal rights, which cannot be measured in money”, and on the other hand it states that: “legal entities by their very nature cannot suffer harm, but the functions of compensation support the need to grant them such compensation.” The court was focused on the interpretation of the non-pecuniary harm, but failed to provide arguments whether it is enough to violate the personal interest or should there be the result of it. This issue should be further precised by the Supreme Court.

Even if we understand the damage not as a consequence, but as a violation of protected interest, there still would be a problem with ascertaining the scope of damage. If there is no suffering, how to determine its scope according to Art. 448 KC? This question is still open.

The court noticed the difference between the violation of interests of those entities which are entrepreneurs, and those which do not run a business, but failed to make a clear distinction between their damage and the scope of the means of protection provided in Arts. 24 and 448 KC. Firstly, if there is a violation of personal interests of an entrepreneur, the legal entity sustains pecuniary damage. The argument that the damage is hard to quantify does not mean that the damage (which is of pecuniary nature) is not possible to be determined. Thus, the statement that in such a situation, when there is a pecuniary damage, the pecuniary means of protection (including compensation for non-pecuniary harm) are more proper, seems to be incorrect. If the violation of personal interests leads to pecuniary damage, the claim for compensation for non-pecuniary damage shall be dismissed. A clear distinction between the pecuniary and nonpecuniary damage shall be made. It is clear that **dissemination of false information about an entrepreneur that harms its reputation, will consequently result in reduced enterprise value.⁴⁸ Nevertheless, such damage, although difficult to capture, should not be camouflaged under the form of non-pecuniary damage.**

Unfortunately, the court did not provide strong arguments why in a case of the infringement of personal interest of a legal entity other sufficient means of protection provided by the legislator (*inter alia*: the claim for restitution, apology, the award of a specific amount for a social purpose, compensation for pecuniary damage, see: Arts. 24 and 448 KC) are not sufficient.

Finally, the boundaries between legal entities' personal rights to good name and the right of individuals to express their own opinions (freedom of speech) must be established. The problem relates not only to private legal persons, but also to public entities. It shall be underlined that in some courts' opinion municipal legal persons have got their own personal rights.⁴⁹ Therefore, the question should be asked whether it is justified that public legal persons (the municipal and

48. See: B. Gadek, Szkoła wyrządzona czynem nieuczciwej konkurencji – zagadnienia wybrane. Księga pamiątkowa Profesora Adama Szpunara, Zakamycze 2004, p. 645

49. T. Baran, Dobra osobiste osoby prawnej na przykładzie jednostek samorządu terytorialnego, [in:] Osobowość prawna jako przesłanka wykonywania konstytucyjnych wolności i praw, eds. M. Bernaczyk, M. Jabłoński, E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2019, pp. 133–157.

the State Treasury entities, as well as the political parties) are entitled to the protection to the same extent as a private legal person. In such a case the risk of abusing the pecuniary means of protection of personal interests of public legal entities increases. Surprisingly, this issue was not analysed by the Supreme Court.

Conclusions

Although the Supreme Court has ruled on the admissibility of the award of compensation for non-pecuniary damage caused to legal entity, the arguments provided in its justification still may raise many doubts, especially in the light and the wording of the provision governed by the Civil Code. It seems that the Polish Supreme Court followed the tendency of foreign European Countries case law and attempted to interpret the provisions in accordance with ECHR and ECJ case law, despite strong arguments against the claim of legal persons for compensation for non-pecuniary damage (here: the problem with the definition and concept of non-pecuniary damage which in the Polish legal system was originally restricted to natural persons). The court also failed to indicate why the same scope of protection shall be granted to public legal persons. In order to eliminate the doubts, the Polish legislator should take steps to change the legal provisions and introduce a clear ground for the compensation for non-pecuniary loss caused to legal entities. As an example the Slovenian solution shall be indicated, where the legislator strictly provided grounds for compensation for non-pecuniary harm caused by violation of personal interests of a legal entity.

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Zadośćuczynienie za krzywdę wyrządzoną osobie prawnej – czy uchwała Sądu Najwyższego z dnia 3 października 2023 r. (sygn. akt III CZP 22/23) stanowi remedium dla polskiego systemu prawnego? Kilka uwag krytycznych w perspektywie porównawczej

Wchwałe z dnia 3 października 2023 r. Sąd Najwyższy przesądził o dopuszczalności zasądzenia zadośćuczynienia dla osoby prawnej w razie naruszenia jej dobra osobistego. Choć orzeczenie to ma duży walor praktyczny i jest bardzo interesujące z teoretycznego punktu widzenia, uzasadnienie sądu może budzić więcej wątpliwości niż dawać odpowiedzi na pytanie, czy zasadne jest przyznawanie osobom prawnym zadośćuczynienia za krzywdę. Dokonując analizy porównawczej tego zagadnienia, autorka niniejszego artykułu dokonuje oceny, czy argumenty przedstawione przez Sąd Najwyższy należy zaaprobować.

Słowa kluczowe: szkoda niemajątkowa, krzywda, dobra osobiste, osoba prawna, odszkodowanie

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