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Commentary on the Judgement of the Court of Appeal in Krakow of 12 May 2015 (File No. I ACa 204/15)

Thesis: The right to plan a family and the ensuing right to legal termination of pregnancy under conditions specified in Art. 4a of the Act of 1993 on Planning Family, Human Foetus Protection and Conditions of Pregnancy Termination is a personal interest.

1. The judgment of the Court of Appeal in Krakow of 12 May 2015 in the case I ACa 204/15, which is a subject of this gloss, considers a significant problem of the case referred to in the subject literature as wrongful birth. The glossed case concerned a wrongful birth action launched by the mother of the child against the hospital for financial and non-financial damage caused by the doctors employed by the defendant who carried out the foetus examination, which, according to the claimant, prevented a discovery of the foetus impairment mentioned in Art. 4a par. 1 point 2 of the Act of 7 January 1993 on Planning Family, Human Foetus Protection and Conditions of Pregnancy Termination[1]. According to the claimant, in consequence of the above action, she was denied information about the foetus health condition and, in effect thereof, she was deprived of the right to make a decision on lawful termination of pregnancy, which eventually led to the infringement of her personal interest in the form of the right to decide about giving birth to a child.

1 Consolidated text Journal of Laws 1993, No. 17, item 78 as amended [Tekst jedn. Dz.U. z 1993 r. Nr 17, poz. 78 ze zm]. According to the cited provision: "An abortion may only be carried out by a physician if: (...) 2) prenatal tests or other medical conditions indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening his life"

To begin with, it should be clearly emphasised that the subject of the glossed judgment was the issue of liability for the admissibility of delivery of the child with genetic defects and other serious impairments against a potential will of her parents despite the occurrence of circumstances admitting lawful termination of pregnancy. Moreover, another issue that emerged therein was the exclusion of claim limitation due to exceptional and special circumstances grounded in the general clause of the "principles of community life" originating from Art. 5 of the Civil Code. Nevertheless, it should be noticed that quite other and yet important reasons decided about an unprecedented nature of this judgment in the light of the previously adopted case law[2]. Hearing the case, both instances courts focused on the axiological nature of general clauses in the context of the principle of equity and community life while somehow omitting the essence of the nature of contractual relationship that the relation within the scope of liability for damages for torts undeniably is. It should be pointed out here that the decision of the Regional Court that was upheld by the Court of Appeal evokes numerous controversies due to considerable substantive law defects. Generally, however, in order to discuss and understand the issues considered herein profoundly, it is necessary to analyze the facts of the case that were the grounds of the invoked judgment.

2. On 5 September 2005 the claimant came to SPZOZ[3] in S. After performing the USG test, doctor M.N., a specialist gynaecologist, confirmed the claimant's pregnancy as six weeks and two days. Next appointment was scheduled for 14 October 2005. The USG test was also performed on this day by doctor M.N. in the fourteenth week and second day of the pregnancy, in effect of which no abnormalities were found in the foetus. Next appointment took place on 12 December 2005 during which the claimant was examined by another doctor – P.S. – a specialist in gynaecology and obstetrics. After performing the USG test, the pregnancy length was confirmed as 22 weeks and 5 days while the registered results of the test were correct. Concurrently, on the same day, the claimant's foetus was X-rayed by the apparatus from the X-ray laboratory but the scan was not assessed by doctor P.S.. According to the description of the factual condition contained in the judgment, the scan disclosed changes in the foetus's spine and flatten skull bones.

Next appointment took place on 20 February 2006. After performing the USG test, the pregnancy length was recorded as 32 weeks and 3 days. Apart from the

2 See: the judgment of the Supreme Court of 13 October 2005, IV CK 161/05, Legalis No. 75250; the Supreme Court judgment of 6 May 2010, No. 248326] and the judgment of Supreme Court III CSK 16/08, Legalis No. 108175 and the judgment of Supreme Court of 12 June 2008, Legalis No. 108175, the judgment of the Supreme Court of 21 November 21 2003 V CK 16/03, Legalis No. 62304.

3 The Independent Public Health Care Institution, in accordance with the accepted views of doctrine and jurisprudence, has the status of an independent legal entity.

previously recorded results, a slight extension of one of the brain's side ventricle was noticed. It was the reason for referring the claimant to the superior referential centre, i.e. (...) Centre (...) in K., where on 22 February 2006 during the test a doctor diagnosed the foetus with hydrocephalus and recommended the claimant consult Dr D. in Ł.

After another consultation, the claimant was referred to the Institute Centre (…). On 28 February 2006 genetic USG and echo tests were carried out there in result of which the foetus was diagnosed with: "*spina bifida (split spine) of the lower back, a potentially incorrect structure between the neck and the chest as well as the backbone, functionally extended side ventricles of the brain, a potential development of microcephaly (to be further observed), and clubfeet*"[4]. Eventually, on 5 April 2006 the claimant gave birth to the girl who soon afterwards was diagnosed with meningocele of the thoracic and lumbar spine, paralysis and deformation of lower limbs as well as extended brain ventricles while the kidneys' USG test confirmed extended renal calyxes[5]. Soon after her birth, the child underwent neurosurgery involving hernioplasty and implantation of ventriculi-abdominal shunt, and started rehabilitation. Since her birth, the child is under permanent care of an orthopaedist, nephrologist, neurosurgeon and rehabilitation specialist.

For the above reasons, the claimant brought a suit against SPZOZ in S. on 9 November 2011 claiming PLN 500.000 compensation and PLN 43.513,29 damages from the defendant together with statutory interest from the day on which the suit was served, and determining the defendant's future liability for the effects of the incident (event) embraced by the suit.

According to the claimant, the defendant infringed her personal interest in result of unlawful action, in effect of which she suffered harm and damage. The claimant specified harm as all pain she suffered whereas damage as a total amount of expenses she incurred from the day on which the foetus was able to live independently outside the mother's body. At the same time, the claimant pointed out that the harm and damage were adequately caused by the defendant's unlawful action. The claimant also estimated that the claim for damages contained costs paid for the daughter's treatment.

The defendant applied for the dismissal of the claim on the ground of claim limitation. Additionally, he denied the claimant's arguments provided as the grounds of the suit.

Under the judgment of 4 November 2014, the Regional Court in K. awarded the claimant M.T. PLN 250.000 compensation from the defendant SPZOZ in S. together with statutory interest from 20 March 2012 until the day of payment, and PLN

4 Justification of the judgment of the Court of Appeal in Krakow of 12 May 2015 I ACa 204/15, Legalis No. 1315349.

5 *Ibidem.*

30.917,79 damages together with statutory interest from 20 March 2012 until the day of payment. The Court dismissed the claim in other parts and determined the cost of proceedings. Both parties appealed against this judgment.

Hearing the appeal of both parties against the judgment of the Regional Court on 28 April 2015, the Court of Appeal in Krakow, I Civil Department, dismissed both appeals as unreasonable (unjustified). At the same time, in accordance with the thesis quoted in the introduction to the article, the Court of Appeal ruled that the right to lawful termination of pregnancy under conditions specified in Art. 4a of the above quoted Act is a personal interest.

3. Referring to the most crucial arguments and theses related to the subject matter of this gloss that were contained in the reasoning to the discussed judgment, it should be pointed out that the Court of Appeal in Krakow treated the facts established by the Regional Court as its own. The Court of Appeal decided that they were established and examined correctly and complied with the current opinions of the judicature while satisfying all criteria indicated in Art. 233 § 1 of the Code of Civil Procedure. What is more, the Court decided that substantive law was not infringed in this case, which was the subject of appeal of both parties.

The Court decided that the right to plan a family and the ensuing right to lawful termination of pregnancy under conditions specified in Art. 4a of the Act of 7 January 1993 on Planning Family, Human Foetus Protection and Conditions of Pregnancy Termination is a personal interest. Furthermore, the Court approved of the opinion expressed by the first instance court according to which the right to decide about raising a disabled child is a personal interest of "the highest value". This opinion of the court was supported by the Supreme Court's case law expressed, *inter alia*, in the judgment of 21 November 2003[6]. In the discussed case, unlawfulness of doctor's conduct resulted from his violation of Art. 19 par. 1 point 1 of the Act of 30 August 1991 on Healthcare Facilities[7] as well as infringement of Art. 4 of the Act of 5 December 1996 on the Profession of a Physician and Dentist[8] saying that: *A doctor shall be obliged to perform his profession in accordance with the current state of medical science, using available methods and measures of preventing, diagnosing and treating illnesses in compliance with the rules of professional ethics and with due diligence*. The

6 V CK 16/03, OSNC No. 6, issue 104 [V CK 16/03, OSNC Nr 6, poz. 104].

7 Consolidated text Journal of Laws No. 91 item 468, as amended [Dz.U. Nr 91, poz. 468 ze zm.] The act has been repealed by the provisions of the Act of 15 pril 2011 on medical activity. Currently, the content of the provision of art. 19a of the Act on health care institutions, we find in the provision of art. 4 act of 28 January 2016 on patients' rights and the patient rights ombudsman [ustawa z dnia 28 stycznia 2016 r. o prawach pacjenta i Rzeczniku Praw Pacjenta] (tekst jedn. Dz.U. z 2016 r. poz. 186 ze zm.) Consolidated text Journal of Laws 2016, item 186 as amended]

8 Consolidated text Journal of Laws 2005, No. 226, item 1943, as amended [Dz.U. z 2005 r. Nr 226, poz. 1943 ze zm.].

Court believed that the violation of the above quoted provisions was the effect of a failure to provide due diligence by the doctor employed by the defendant while performing the USG tests, and then a failure to inform the claimant about the foetus's defects, which prevented her from making an informed decision about the pregnancy.

Moreover, it should be pointed out that according to the Court of Appeal, awarding the claimant PLN 30.917,79 from the defendant, the Regional Court violated neither Art. 361 § 1 of the Civil Code nor § 2 thereof. The Court noticed that the redress of damage embraces the loss while in this case the losses suffered by the claimant are extraordinary expenses ensuing from the fact that the needs of the disabled child generate more costs than those of a healthy child.

Furthermore, the Court of Appeal agreed with the opinion of the Regional Court on the grounds to apply Art. 5 of the Civil Code in the context of the limitation of claim raised by the defendant. The Court of Appeal believed that the limitation period had rightly begun to run at the moment of the child's birth. The Court also agreed that setting up the statute of limitation in this case is contrary to the principles of community life. The Court believed that even though the claimant was late with initiating the subject suit in effect of the violation of her personal interest by the defendant, the reasons for this delay ensued from the necessity to commit herself to taking care of the ill child.

What is more, the Court ruled in the discussed judgment that both parties' reasons for the appeal concerning violation of Art. 448 of the Civil Code are wrong. The Court decided that according to the facts of the case, personal interest of the highest value was indeed infringed while the awarded amount of PLN 250.000 was adequate in the meaning of the above quoted provision and absolutely satisfied its compensatory role.

4. To start with, it should be emphasized that the relevant case law is not totally uniform even though it is clearly predominated by the opinion expressed in the judgment of the Court of Appeal in Krakow in the case I ACa 204/15. It may even be said that a certain tendency becomes apparent, which somehow entails departure from elementary assumptions of substantive law regulating liability for harm or damage consistently or rigorously.

Nevertheless, as far as the described facts of the case are concerned, it is essential to focus on the content of Art. 361 of the Civil Code in connection with Art. 6 of the Civil Code containing a fundamental ground for the resolution of the occurrence of prerequisites of liability for damages, i.e. most of all, the adequate chain of cause and effect[9]. (Based solely on the data contained in the reasoning to the analyzed judgment) it seems that both first and second instance courts carried out hearing of

9 P. Sobolewski, Komentarz do art. 361 kc. (in:) K. Osajda (ed.), Kodeks cywilny. Komentarz, Warszawa 2017.

evidence relying only on the formal aspect based on the established infringement of the above specified provisions of law separating the proceedings from the substantive requirements set forth in the Civil Code. What should be considered here is the fact that even unquestionable acceptance of the expert evidence on a possibility of detecting the foetus defects already on 12 December 2005 (after analyzing three results of the USG tests), and the fact that at that time the foetus was not able to live independently outside the pregnant woman's body yet, do not decide about the liability of the doctor or SPZOZ employing him/her in relation to the pregnant woman who, not knowing about these defects, was deprived of the possibility to exercise the right to lawful termination of pregnancy. What is more, this is not decided even by the proved prerequisite of guilt of these entities[10].

The above and similar cases concern an extremely difficult problem of determining a peculiar counterpart of the so-called potential damage, i.e. the situation where a certain already specified event could affect another equally specified event which still has not occurred[11]. In other words, assuming that all evidence has been proved, the Court should examine whether the claimant would have exercised the so called right to abortion at all, that is if the pregnancy would have been terminated[12]. According to the norm expressed in Art. 6 of the Civil Code, the burden to prove this fact lies solely with her, and only if this circumstance had been confirmed, it would be admissible to consider the occurrence of the adequate chain of cause and effect[13]. However, neither first nor second instance court considered this while hearing evidence.

Obviously, it cannot be absolutely certainly determined whether the claimant would have undoubtedly decided to abort the child if the doctors had acted properly. Finally, it is not possible to prove beyond reasonable doubt that specific effects expected by a given entity (not giving birth to the child) would have happened if it had not been for the interference or unintentional change of conditions caused by undue performance of the obligation or tort. For example, the defendant could have argued

10 Particularly noteworthy are considerations regarding the fault and the degree of doctor's diligence, made by M. Sośniaka, Cywilna odpowiedzialność lekarza, Warszawa 1989, p. 103 and following. Z nowszej literatury zob. M. Nesterowicz, Prawo medyczne. Komentarze i glosy do orzeczeń sądowych, Warszawa 2017, p. 112 and following.

11 See: judgment of the Court of Appeals in Katowice of 15 November 2011 in case I ACa 689/11, Legalis No.1049546.

12 He seems to be right: E. Gniewek, iż dyspozycja art. 6 of Civil Code. it can also be a norm directed not only to the string, which for natural reasons depends on the proper determination of certain facts, but also to the court, see: E. Gniewek, Kodeks Cywilny. Komentarz, Warszawa 2016, p. 24.

13 The justification of the judgment of the Court of Appeal in Warsaw of 23 June 2015 issued in the case VI ACa 1167/14, Legalis No. 1338016. Analyzed in its pages, the actual situation differs from the case described in the vote, but also reflects the sense and perspective of circumstances that cannot be derived in a complete and direct way, and above all puts possible reasons for evidence, from which it does not absolve them current, even different ruling line.

that one should leave some space for natural human reflections emerging from fear or moral concerns that would have finally qualified the claimant's conduct as a future and uncertain event which, in consequence, would have led to the elimination of the reasons for litigation and its dismissal.

Nevertheless, this sphere should be understood slightly differently. As far as the discussed facts of the case are concerned, it should have been established that the claimant actually undertook important decisive and consistent steps in order to terminate pregnancy, and that her attitude fit a logical chain of actions whose natural aim and consequence was to exercise the rights guaranteed by the Act on Planning Family, Human Foetus Protection and Conditions of Pregnancy Termination[14]. To put it simply, it can be presented in the following way: if the claimant had known about the defects, she would have exercised the right to terminate pregnancy because her intention explicitly ensued from the witnesses' evidence, claimant's deposition and entries in medical records. Yet, the analyzed proceedings did not explain this.

The Court's decision saying that the doctors' conduct prevented the claimant from considering a possibility of terminating pregnancy is merely an extended chain of imprecise alternatives in effect of which almost everything is recognized as inherent personal interest that may not be infringed by any conduct not satisfying the expected norm. Such an attitude is in absolute opposition to the adequate cause and effect chain. Depriving someone of a possibility of considering something is merely stripping him or her of the right to reflect rather than the right to choose[15]. It makes his or her individual circumstances lack a possibility of reflecting on some issue and devoting some time to it with the concurrent "blessing" of not using this right. If in effect of such circumstances a congenitally diseased child is born, the claimant and then the court hearing the case should establish, step by step, effect after effect, what has led to such negative consequences[16]. A possibility of reflection would have caused that the claimant could have acted completely different. First of all, she might have not taken advantage of the very possibility itself at all, that is she might have not even analyzed her situation. Secondly, this consideration could have made her decide to terminate as well as continue pregnancy. All such doubts distort the adequacy of the cause and effect chain and should result in the dismissal of litigation[17].

14 The issues touched upon perfectly illustrate the case of the so-called "Łomża case" in the case being the subject of the decision of the Białystok Court of Appeal of 4 July 2008 I ACa 278/08, Legalis No. 158117. Nie zachodziły w niej wątpliwości, co do poczynań powódki i jej zamiaru wobec poddania się procedurze terminacji ciąży.

15 See: the Judgment of the Court of Appeals in Katowice of 15 November 2011 I ACa 689/1, Legalis No. 1049546.

16 On the issue of the adequacy of the causal relationship and the obligation to prove it see: the judgment of the Łódź Court of Appeal of 23 July 2013 I ACa 1160/12, Legalis No. 736121.

17 Compare the justification of the judgment of the Court of Appeal in Lublin of 21 April 2015, I ACa 894/14, Legalis No. 1249618.

The consequence of the Court's decisions is the need to award compensation also when the claimant unambiguously claims that she would have never exercised the right to terminate pregnancy as it is against her moral beliefs. Since the doctor failed to fulfil the obligation of informing the claimant, in result of which she did not have relevant knowledge, regardless of her attitude to the right to abortion, she was deprived of the possibility of considering the issue, which is to decide about the violation of personal interest. It is essentially *per absurdum* reasoning.

Furthermore, the Court of Appeal did not uphold the defendant's reason for appeal concerning violation of Art. 5 of the Civil Code with regard to limitation (which will be referred to later on). Nevertheless, this Article was actually violated – in the context of the analyses pursued above. The Bench has apparently disregarded the fact that even though the previous, dismissed suit in the case I C 1951/08 initiated by the statutory representative (now the claimant) did not satisfy the *rei iudicatae* directive but it somehow disclosed her reasoning and intentions. In the previous suit filed on her daughter's behalf, she claimed PLN 150.000 compensation from the same defendant for the doctor's negligence leading to the wrong forecast and diagnosis, failure to recognize prenatal disorders of the minor, in result of which she was deprived of undertaking possible preventive measure, i.e. commencing appropriate treatment, in particular operating the foetus before her birth[18].

Hence, it should be noticed that *nasciturus* is not a disposer of her rights. Therefore, decisions about specific invasive surgeries would have been made by her statutory representatives on her behalf. Whereas the representative believed that deprivation of a possibility of treatment and prenatal operation was harm. For this reason, the discussed lack of possibility of terminating the same pregnancy cannot be harm any more[19].

It is obvious that the previous suit in the case I C 1951/08 examined the harm suffered by the daughter of the current claimant. However, due to the child's young age (she was 2 years old at that time), the whole logical process was conducted by her statutory representatives and it directly illustrates their point of view. Therefore, the suit in the case I C 2892/11 became merely a different way, mechanism or path to win substantial compensation and damages.

Additionally, it should be noticed that in the light of the above court's arguments, insofar as harm suffered in result of the violation of the right to information may be actually established, proving financial harm becomes problematic. If the Court

18 In the context of the plea of limitation raised by the defendant in connection with improperly stated in the appeal allegation of violation of the principle of res judicata, it is worth reviewing the position of the Supreme Court in the judgment of 24 September 2009 IV CSK 43/09, Legalis No. 265790.

19 The abuse of law with regard to the protection of personal rights – commentary to art. 24 Civil Code.: E. Łętowska, K. Osajda, (in:) M. Safjan (ed.), Prawo cywilne – część ogólna. System Prawa Prywatnego, t. 1, Warszawa 2012/Legalis.

resolving the request decided that the infringed provisions of law violate the claimant's personal interest, the harm should remain in the adequate cause and effect chain with regard to the violated interest exclusively. In other words, if the claimant was not informed about the foetus's defects, in effect of which she suffered harm of infringed personal interest, then funds necessary for treatment, care or rehabilitation of her born child are not related at all to the infringement of her personal interest. They are certainly not adequately related in the meaning that has been previously adopted by the Polish doctrine of civil law.

The judgment is logically incoherent in this respect too. If the Court of Appeal did not uphold the alleged infringement of Art. 316 § 1, Art. 328 § 2 and Art. 233 of the Code of Civil Procedure finding the facts of the case established by the Regional Court as its own, it also approved of the opinion held by the Regional Court in Krakow, expressed in the following conviction: *according to the Regional Court, claiming PLN 700.000 compensation and arguing that this amount was to, at least partially, help to recover the minor O.'s health, the claimant appears to confuse the individuals entitled to compensation. Of course, improved health condition of the claimant's daughter will affect the intensity of suffered harm, nevertheless, the claimant is a person entitled to compensation because her personal interest has been infringed*. In consequence, the Court of Appeal decided that *the claimant has not demonstrated some costs*. The Court did not accept the request for *sensu stricte* procedural reasons and not due to those ensuing from substantial law. Meanwhile, under Art. 24 § 2 of the Civil Code, *if the infringement of a personal interest resulted in financial harm, the victim may demand redress thereof under general rules*. According to the Court, in effect of infringed personal interest, *the claimant was deprived of a possibility to consider*, but not deprived of her right to terminate pregnancy, which only then (as in the Łomża case[20]) could justify the recognition of the costs of treatment, rehabilitation and general care of the child as financial harm. Otherwise, there is no "bridge" spanning the infringement of personal interest and the costs claimed in the litigation to decide about the adequate cause and effect relation because we do not know if the claimant would have exercised the right to abortion. In brief, if the claimant had not sufficiently proved that she had intended to exercise the right to terminate pregnancy, it is not legitimate to assume that both financial and factual impediments resulting from the child's disability constitute harm suffered by her mother. Constructing a specific "chain" of interconnected dependencies joined by absolutely uncertain and improperly established circumstances does not permit to find them as regular, adequate and commonly known consequences of specified events. This way, the common court relocated the burden of maintenance of the disabled individuals from public funds into therapeutic entities, which does not appear to be justified.

20 See: the judgment of the Appeal Court in Białystok of 4 July 2008, I ACa 278/08, and Legalis No. 158117.

5. Finally, we should consider the issue connected with the limitation of claim duly raised by the defendant. We should think about the sense of existence of the institution of limitation if its duration is not categorically fixed and, generally, due to non-uniform case law, there is always a risk that the court hearing a case will decide to apply extensive interpretation of Art. 5 of the Civil Code. It is true that the Supreme Court's case law contains peculiar instructions (recommendations) permitting to withdraw from the prevailing limitation rule, but the courts hearing the discussed case have not applied it[21]. The problem is that the court hearing an individual case may find nearly any danger in the so-called principle of abuse of law. Relying solely on the analyzed facts of the case, it may be reasonably stated that there were no grounds to refer to Art. 5 of the Civil Code. Considering the reasons to the judgment, there are absolutely no doubts as to the fact when the claimant learnt about harm or damage, or when she literally experienced it. Finally, it is also undeniable that the claimant was physically and intellectually capable of suing much earlier as she had done it first time already on 31 July 2006. The claimant was over two years late. Therefore, in compliance with the prevailing opinion, this period is too long to justify talking about the abuse of law or harm suffered in effect of the application of this law[22]. Taking into account special and exceptional circumstances cannot directly lead to disrespect for substantive law preceded by reference to the allegedly higher principles. Hence, considering the complexity of the problem and the claimant's awareness of the harm she suffered as well as the period of delay, the author of the gloss believes the litigation should have been dismissed.

21 For example, it is worth paying attention to the judgment of the Supreme Court of 9 July 2008, V CSK 43/08, Legalis No. 340496.

22 Accurately about the possibilities and circumstances of the application of art. 5 of the Civil Code in relation to the alleged limitation of pleadings – a similar factual state – the Appeal Court in Katowice appealed – I Civil Department of 8 July 2016, I ACa 265/16, Legalis No. 1509011.