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L'égalité devant les charges publiques as the basic of state liability on equity under French law

L'égalité devant les charges publiques jako podstawa odpowiedzialności państwa na zasadzie słuszności w prawie francuskim

Abstract

State liability on equity is a legal institution, guaranteeing citizens a possibility of acquiring compensations for damages resulting from legitimate actions of the public authority. In the Polish legal system it is regulated by art. 4172 of the Act – Civil Code and is an element of a panel of regulations art. 417–420 of the Civil Code, standardising the issues of liability of the public authority. Article 4172 has a special and auxiliary character, considering the liability for a damage caused by the public authority as a result of its legal actions as a revision of liability on general terms. In the French law the counterpart of the Polish principle of equity is the principle of equity before public burdens (l'égalité devant les charges publiques), which is the basis for the authority's liability for legal actions. This non-code construction, being a domain of the administration law, was shaped in France especially by the case law of the Council of State and the Court of Competence and today is used to settle damages caused during hospital treatment, based on equity to the public hospital. This institution is similar to the Polish one but the commonness of its usage in France, as well as its non-code character, are sufficient reasons to conduct an in-depth research in that regard.

Keywords

principle *l'égalité devant les charges publiques*, state liability on equity, the principle of equity under French law

Streszczenie

Odpowiedzialność państwa na zasadzie słuszności jest instytucją prawną, gwarantującą możliwość uzyskania przez obywateli odszkodowania za szkody powstałe na skutek legalnego działania podmiotów władzy publicznej. W polskim systemie prawnym jest ona regulowana na mocy art. 417^2 ustawy – Kodeks cywilny i stanowi element zespołu przepisów art. 417–420 kodeksu cywilnego, normujących kwestię odpowiedzialności władzy publicznej. Artykuł 417^2 ma więc charakter wyjątkowy i pomocniczy, traktując odpowiedzialność za szkodę wyrządzoną przez władzę publiczną w następstwie jej działania legalnego, jako korektę odpowiedzialności na zasadach ogólnych. W prawie francuskim odpowiednikiem polskiej kodeksowej zasady słuszności jest zasada równości wobec ciężarów publicznych (*l'égalité devant les charges publiques*), stanowiąca podstawę odpowiedzialności państwa za działania legalne. Ta pozakodeksowa konstrukcja, będąca domeną prawa administracyjnego, została we Francji ukształtowana w stopniu szczególnym przez orzecznictwo Rady Stanu oraz Trybunału Kompetencyjnego i znajduje dziś swoje zastosowanie w kwestii szkód wyrządzonych przy leczeniu

na zasadach słuszności wobec szpitali publicznych. Instytucja ta podobna jest do polskiej, jednak zarówno powszechność jej stosowania we Francji, jak i jej pozakodeksowy charakter stanowią wystarczający powód do prowadzenia pogłębionych badań w tym zakresie.

Słowa kluczowe

zasada *l'égalité devant les charges publiques*, odpowiedzialność państwa na zasadzie słuszności, zasada słuszności w prawie francuskim

1. Introduction

The State performing the public tasks, undertakes actions that may lead in their consequences to the occurrence of damages on the side of citizens. Widely recognized liability of the public authorities is an issue analysed in the studies of law firms, both Polish and foreign, which brings together a number of fundamental problems of a constitutional, axiological and philosophical nature, and tracing its dynamic evolution – especially in recent years – both nationally and internationally, one can consider that it reflects, to some extent, the nature of the state-individual relationship and allows to identify the ongoing changes in legal thinking and functioning of the new democratic mechanisms. More frequently the matter of a concern to the doctrine of the law is the institution of civil liability for illegal actions or lack thereof of the public authority, regulated in the Polish legal system under article 417 and 417^1 of the Act – Civil Code[1]. These provisions do not predict, however, a situation in which an entity of the public authority acts in accordance with the law, and yet causes damage, which is why the legislator in Art. 417^2 of the Code decided to introduce the institution of auxiliary liability, based on an equity. Both, illegal activities (unlawful activities, abandonment) as well as legal ones, can cause damage directly or indirectly to citizens. It is recognized that the provisions of art. 417^2 introduce liability for the so-called legal damages, so for such impairments that arose in spite of a lawful act. Therefore, in the Polish legal system the provisions of the Civil Code, give rise to a claim of the citizens against broadly understood public authorities for compensation (redress) for the damage that has been caused to them as a result of legitimate activities of those entities. Important, at this point, is an indication necessary to meet the conditions to be able to make a claim for damages to the State Treasury. In addition, the action of the entity of the public authority must be legal, the damage suffered must be severe and occurring only on the person (it cannot be property damage), there must be an adequate causal link between the action of the entity and the damage occurred, and most importantly, granting compensation must be justified by the principle of equity interpreted on a case by case basis by a court. Necessary to meet the criterion of equitable grounds is a moral support (approval) for granting compensation. For example, art. 417^2 of the Polish Civil Code as such approval

[1] The Act dated 23 April 1964 – Civil Code (Dz. U. from 2016, item 380).

indicates "the inability of the victim to work or a difficult material situation," and also, due to the open directory (as evidenced by the use of the term "and especially" by the legislator) other circumstances under which granting compensation would be supported by an appropriate moral acquiescence. Rectification of the damage arising from an action of legal entities of the public authority must, however, take into account the existence of ethical reasons, which must directly justify the need to rely on considerations of equity.

2. The principle of equity and the French *l'égalité devant les charges publiques*

The principle of equity, as well as art. 417[2] in relation to art. 417 of the Polish Civil Code, is complementary in nature to the expressed in the Civil Code general principles. It is used when one cannot use the principle of guilt, and there are no grounds to apply the principle of risk. This article departs from the general principle of social life and introduces in its place associated with it the principle of equity. The genesis of application of the principle equity is the fact that the damage was caused as a result of actions taken by the public authorities for the implementation of the objectives of general interest. According to it, it would not be reasonable for an individual to bear only the burden of the effects of the activities of the public authorities undertaken in the interest of the whole society[2]. Therefore, each decision of the court to grant compensation (or satisfaction) to the victim should be considered *in concreto*, taking into account the financial situation of the individual citizen, the degree of incapacity of the victim to work and indicate the existence of general interest underlying a particular action of the entity of the public authority, and also take into account circumstances relating to the causal event (the severity of the damage suffered or its durability[3]) and even the behaviour of the victim[4].

Under French law, however, adjustment of Member State liability for damage caused is the domain of the administrative law (not the civil law). It is therefore a field of responsibility of the State, regulated outside the Civil Code. In France, the principle of equity

[2] According to M. Safjan: "It is based on the assumption that the actions of the public authorities, which, due to their substance, are taken in the general interest, should not lead to the abandonment of all the risks of damage to the individual, even when it was not possible to avoid the damage and it is a consequence of the fully lawful conduct of public authorities. In such cases, because the burden of actions taken in the general interest should be distributed more fairly – on the whole society or a particular community, especially when it comes to damage particularly acute, related to the upset of health, injury or loss of life" – See M. Safjan (red.), *Standardy prawne Rady Europy. Teksty i komentarze, t. II, Prawo cywilne [Legal standards of the Council of Europe. Texts and commentaries, vol. II, Civil Law]*, Instytut Wymiaru Sprawiedliwości, Warsaw 1995, p. 35–37.

[3] M. Safjan, *Odpowiedzialność odszkodowawcza władzy publicznej* [*Liability for damages of the public authorities*], Wydawnictwo Prawnicze LexisNexis, Warsaw 2004. p. 8; P. Dzienis, *Odpowiedzialność cywilna władzy publicznej* [*Civil liability the public authorities*], C.H. Beck, Warsaw 2006, p. 234.

[4] Cf. judgment of the Supreme Court dated 22 May 2003, II CKN 96/01, LEX no. 137609.

before public burdens (*l'égalité devant les charges publiques*), as the basis for the liability of the State, which is not based on the principle of guilt, has been formed to a degree by the particular law of the State Council and the Court of Competence[5]. The principle of equity before public burdens, as a principle a fundament (*fondement*) of the State liability for damage caused by the legal action, in the course of the issuing subsequent decisions, the subject of which was the problem of responsibility for the factual states, for which the existence of guilt was not required[6], has been supplemented by formed on its basis of general principles (*cause*) justifying the imposition of an obligation for compensation. In situations in which the Council of State shapes liability of the State without guilt, equity is the only justification of responsibility[7]. It happens when the judge citing the principle of equity before public burdens, permits granting compensation for abnormal and outstanding damages, incurred in the general interest. Principle of equity is the direct norm, from which derives the right to compensation[8]. Analysis of decisions in which the Council of State accepted responsibility for breach of equity before public burdens indicates in fact that in these cases it is not so much the fact of sustaining an exceptional and serious damage is the justification of liability, but the result of the assessment of all circumstances associated with causing the damage, which allows to qualify this type of liability as the liability on an equitable basis. And so the first decision in which the Council of State adopted the liability of the State for breach of equity before public burdens was that of 14 January 1938[9] of La Fleurette case. According to the factual state, because of the adoption of a normative act banning the sale products, which have not been produced exclusively based on milk as cream, the factory of La Fleurette, which was the only manufacturer producing a substitute cream in France, had to close its plant. Council of State, referring to the principle of equity before public burdens, acknowledged that the factory should be compensated, because the burden for the damage should be held by the whole society. In the Commune de Gavarnie case, in turn, because of the adoption of a normative act by the mayor ordering pedestrians to walk one designated route in order to ensure the safety of people in the tourist town, the owner of the store located on another route suffered a considerable decrease in sale of souvenirs. Although the ordinance of the mayor was in accordance with the law, the Council

[5] E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonanie władzy publicznej [Liability for damages the execution of public authority]*, C.H. Beck, Warsaw 2006, s. 37–58.

[6] The principle of equity has given rise in France to the formation of acute liability, among others for damages caused by public works, damages incurred as a result of shooting military exercises, the damage caused by the dangerous things. The French doctrine emphasises however that next to the principle of equity the justification of liability in these cases is the theory of risk (see M. Letourneur, *The Concept of Equity in French Public Law,* [w:] R.A. Newman (ed.), *Equity in the World's Legal Systems. A Comparative Study*, Brussels 1973, p. 125–130).

[7] M. Letourneur, *The Concept of Equity…*, p. 269.

[8] Por. J.P. Gilli, *La responsabilité d'équité de la puissance publique*, Dalloz 1971, p. 125–130.

[9] Rev. dr. publ., 1938, p. 87.

of State, in its decision of 22 April 1963, acknowledged that the seller must be compensated from the community because the infringement of the principle of equity before public burdens. The seller cannot bear negative consequences for adoption of the measure in the field of public administration[10]. And so, liability for breach of equity before public burdens can be used in situations in which caused damage is excessive and should be borne by the whole community[11]. A criterion must therefore be met for reasons of fairness, since it is necessary for such circumstances to occur, in the light of which granting compensation will be supported by an appropriate moral acquiescence. A citizen cannot therefore bear the loss for even a legitimate State activity undertaken in the public interest.

L'égalité devant les charges publiques principle is applicable also in the current case-law of the French Council of State, particularly in terms of the damage caused by treatment. Originally, the French administrative case-law, were taking only liability for damage caused by treatment on an equitable basis against public hospitals. The first decision, which was based on the principle of equity before public burdens, was the decision of the Court of Appeal in Lyon on 21 December 1990 on Gomez case. In accordance with the actual state, a minor boy, affected by distortion of the spine, was treated with a new method, which resulted in the paralysis of the legs. According to the ruling of the Court of Appeal the boy should have been granted compensation because of application of a new therapeutic method, the effects of which were not yet known but it was associated with a particular risk that the hospital has taken in order to verify the effectiveness of this kind of treatment. In spite of the choices of method proven, safer and commonly used so far, the hospital decided to use the experimental treatment and the risk of such action, in accordance with the ruling of the Court of Appeal in Lyon, could not be fully borne by only the boy, to which the method was applied. Completed was therefore a condition of grounds of equity as well as the other three conditions for State liability on an equitable basis: hospital took hazardous, yet fully legitimate action, there was a severe personal injury, and there was a direct causal link between the adoption by the hospital the experimental methods of treatment and a heavy injury resulting on the boy. Legal effect of the hospital resulted in exceptional and abnormal heavy complications, and the non-standard method of treatment was chosen despite the absence of a threat to the patient's life[12].

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[10] Activité juridique – Droit administratif, 1963, p. 208; por. R. Szczepaniak, *Odpowiedzialność odszkodowawcza jednostek samorządu terytorialnego [Liability for damages of local government units]*, Wydawnictwa Prawnicze, Warsaw 2001, p. 270.

[11] C. Klein, *Equity at the French Conseil d'Etat,* [w:] A. Rabello (ed.), A*equitas and Equity, Equity in Civil Law and Mixed Jurisdictions*, The Leonard Davis Institute for International Relations, Jerusalem 1993, p. 330.

[12] Por. M. Nesterowicz, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu w prawie francuskim (według ustawy z 4 III 2002 r. o prawach pacjentów)*, "Prawo i Medycyna" 2002, no. 12 [*Civil liabil-*

3. *Solidarité nationale* as the basis for guaranteed State liability on an equitable basis

The basis for State liability on an equitable basis for damage caused by treatment with the application of the principle of social solidarity (*solidarité nationale*), was a decision dated 9 April 1993 on Bianchi case, in which the French Council of State has adopted a State liability on an equitable basis for the risk of therapeutic effect (*les aléas thérapeutique*s). In this case, after the vertebral arteriography under anaesthesia patient suffered paralysis. Council of State found that the risk is known but its occurrence exceptional, and there was no reason to believe that the patient is not particularly susceptible to it. Additional premise, speaking for granting damages was the fact that the medical action was a direct cause of the damage, which remained unconnected with both the initial state the patient and predictable development of this state and had extremely severe character. According to the interpretation of the Council of State, the liability for damages referred to as the risk of therapeutic effect occurs when the damage is caused as a result of a medical accident (*l'accident médical*), when the damage is the result of involuntary action of a doctor (*l'affection iatrogène*) and when the evidence of external cause exempts of liability for hospital infection (*infection nosocomiale*). Therapeutic risks catalogue also includes cases where the injury was caused as a result of medical intervention, undertaken in exceptional circumstances and outside the scope of ordinary activities of a doctor or medical institution. The occurrence of the medical accident, in accordance with article L 1142-1 of the French Act dated 4 March 2002 on the rights of patients and the quality of the health care system, „opens up the right to compensation for the damage arising from *solidarité nationale*, if it is directly attributable to preventive, diagnostic or therapeutic activities, and if it had abnormal consequences for the patient's health condition as its predictable consequences[13]." Thus, shaped by the administrative case-law, based on the principle of equity before public burdens, the responsibility of public hospitals on an equitable basis for damage caused by the treatment, under this Act, was extended also to cases where the patient has suffered damage as a result of treatment in a private hospital[14]. The law on patients' rights and quality of the health

ity for damages caused by medical treatment under theFrench law (according to the Act of March 4, 2002. On patients' rights), "Right and Medicine" 2002, no. 12], p. 117–193.

[13] LOI n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé, Art. L. 1142-1.

[14] Por. M. Nesterowicz, *Odpowiedzialność cywilna za szkody…[Civil liability for damages…]*, p. 117; E. Bagińska, *Odpowiedzialność odszkodowawcza…[Liability for damages…]*, p. 48; Y. Lambert-Faivre, *La loi n° 2002–303 du 4 mars 2002 relative aux droits des malades et à la qualitè du systemè de santé,* Dalloz 2002, Chronique nr 17, p. 1367–1369; K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu [Civil liability for damages caused by medical treatment]*, Dom Organizatora TNOiK, Toruń 2007, p. 310 and n.

care system therefore only determines the possibility of a claim for compensation for damage caused by the treatment only after the onset of the so-called medical accident and in accordance with the principle of *solidarité nationale* and it is irrelevant whether the patient suffered damage as a result the actions of a public or private hospital. What is worth emphasising, the principle of social solidarity is an extension of the principle of equity before public burdens, and in order to be used, benchmarks must be filled for the possibility of claims for State liability on an equitable basis. Medical action must be lawful and between it and the damage occurred there must be a direct cause and effect relationship, and most importantly, the condition for the application of the principle *solidarité nationale* is the occurrence of the damage having exceptionally severe character[15]. The compensation may be granted only if medical acts "represent the character the severity established by a decree, evaluated by taking into account the loss of functional ability and consequences on the private and professional life, taking into account the degree of permanent disability or duration of the temporary inability to work". It is also important to indicate that the consequences such as damages were abnormal and unpredictable in nature to the initial condition of the patient. This premise has been softened in relation to the requirements arising from the judgment in the Bianchi case, where a requirement was made that the damage remained unconnected with the patient's initial condition. The French doctrine indicates a favourable interpretation for the victim of that condition[16]. The case-law accepts that the damage is not related to the initial state of the patient despite the existence of a causal link between the damage and the specific patient's predispositions that may increase the risk of its formation, if not revealed until the day of the accident[17]. The premise of serious character of the personal damage in relation to private and professional life is fulfilled only when the degree of disability of the victim is at least 25%, according to the rules established by the decree of the Council of State[18]. The introduction of this restriction was criticized in the French doctrine[19]. Reference is made to fact that it excludes the application of the equity regime against most victims. To draw the line of possibility to obtain compensation from the degree of incapacity determined by the decree is also based only on the ability of the body functions, while the text of the Act requires that the assessment of the serious nature of personal injury was made taking into account the effects on both private and professional life of victim (considering each case individually). Meanwhile, even moderate personal

[15] Por. K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna… [Civil liability…]*, p. 307.

[16] D. Philoupoulos, *La réparation des risques sanitaires au titre de la solidarité nationale mise à l'épreuve devant le juge*, Recueil Dalloz 2007, no. 26, p. 1813–1817.

[17] La décision du Conseil d'Etat du 27 Octobre 2000 au Centre hospitalier d'Angoulême.

[18] Décret n° 2003-314 du 4 avril 2003, modifié par le décret n° 2011-76 du 19 janvier 2011 (JORF n°81 du 5 avril 2003 page 6114 texte n° 25).

[19] Y. Lambert-Faivre, *La loi n° 2002-303…*, p. 1370–1371.

injury can in certain cases lead to serious consequences in professional life of victims (the French doctrine provides here frequently examples of the cellist devoid of a finger, or the pilot devoid of an eye[20]). Replacement of individual assessment with a constant, used in each case norm may therefore frequently lead to undesirable consequences. In order to facilitate the settlement of disputes, the Act as an alternative to litigation, provides the establishment of regional conciliation committee, and in cases where the *solidarité nationale* is applied, the French National Office for Compensation for Medical Accidents (*L'Office national d'indemnification des accidents médicaux*)[21] participates in the proceedings.

4. Conclusions

The principle of equity before public burdens and the principle of social solidarity, provide the basis for the use of State liability on an equitable basis in the French law. Compensation for lawful activities of the public authorities, may be granted if it is obviously wrong, that the effects of the damage are incurred only by an injured person when the action was taken in the general interest, the damage was suffered by one person or a limited number of people, and the action is exceptional in nature or damage was exceptional due to the action[22]. The State liability on an equitable basis characterized in this article, represents a special guarantee for the protection of citizens' rights against the legal interference of the public authority entities, which causes personal injury. The French non-code regulation regarding this type of liability is particularly noteworthy because in France it is used much more widely than in Poland, and by analysing the current case law in this area, a conclusion can be drawn that this institution is evolving towards the widest possible implementation range, and applies not only to the liability of the public authorities, but also private entities, in terms of the responsibility on an equitable basis for damage caused by treatment. The growing number of claims, both in Poland and in France, for compensation for damages caused by the legal action the State, and the amount of granted compensation, evidence undoubtedly an interesting phenomenon of democratisation of the relationship between an individual and the State and deserve a special analysis in this regard.

[20] M. Letourneur, *The Concept of Equity…*, p. 318.

[21] Y. Lambert-Faivre, *La loi n° 2002–303…*, p. 1367–1369; K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna… [Civil liability…]*, p. 320–333.

[22] Cf. Principle 2 of the Council of Europe recommendations No. R / 84/15 dated 18 September 1984 on liability of public authorities.

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