Monetary compensation for non-material damage now and then in the perspective of French and Polish legal systems

Krzysztof Bokwa
ORCID: 0000-0002-7625-6809
General History of Law Department, Law and Administration Faculty, Jagiellonian University

Iwo Jarosz
ORCID: 0000-0003-3671-1982
Civil Law Department, Faculty Law and Administration, Jagiellonian University

Article info
Accepted 30.09.2020

1) The author is a graduate of the Law and Administration Faculty of the Jagiellonian University, a doctoral candidate in the Common History of Law Department at the Jagiellonian University and an attorney in Kraków.

2) The author is a graduate of the Law and Administration Faculty of the Jagiellonian University, a doctoral candidate in the Civil Law Department at the Jagiellonian University and an attorney at law in Kraków.

Academic Supervisors:
prof. dr hab. Andrzej Dziadzio
prof. dr hab. Fryderyk Zoll

Keywords: moral damages; moral harm; non-pecuniary loss; Polish law; French law.

Introduction

Certain institutions, in particular ways that law approaches various social problems, tend to seem perennial, especially so for those who refrain from a diligent study of comparative law in its historical aspects. Lawyers practicing or educated in Poland usually treat the issue of tortious liability for moral damages as an obvious given, assuming that their jurisdiction's stance toward this problem is and was universal in civil law culture. It is true that in contemporary civil law there is a strong tendency to widen the extent of legal protection of non-pecuniary interests. However, the reality is that this is not exactly the case – the way private law in Europe (and jurisdictions where European- or heavily European-influenced law is in force) nowadays treats the issue of moral harm incurred as a result


The last decades have witnessed – in civil law jurisdictions – a growing concern about instruments of legal protection of non-material interests, in particular: redressing non-material losses sustained as a result of tortious acts. Legislation and case-law alike try to address this complex problem. The aim of this paper is to present, in a comparative context, the historical development of admissibility of monetary compensation claims for non-material damage in French civil law (the Napoleonic Code) and jurisdictions that have adopted French law or structured their civil law legislation around French paradigms as well as in Polish law. Though the contemporary private law of Poland is far more related to the laws of Germany and Austria, French civil law, which was in force in the territory of Congress Poland for over a century, was and still is an important benchmark for ever-valid comparative analysis. The very broad and liberal way in which contemporary Polish law approaches the issue of compensation for non-property harm seems to be one of the issues where French inspirations played an important role. The authors employ legal comparative and historical methods, supplanted by formal-dogmatic ones, to present the evolution of tort law concerning monetary liability for non-material loss.

Volume 40, Number 4, 2020
of tort (delict) has been a result of a long evolution, with differing stances taken by various jurisprudential and scholarly interpretations of oftentimes virtually identical rules.

The issue of recoverability of moral damages in tort is not infrequently obstructed by the much more contemporary problem of compensability of moral harm inflicted by breach of contract – a problem worthy of volumes of analysis. Nevertheless, how jurisprudence and doctrine in France and systems influenced by the French civil law arrived at the position of allowing tortious claims for compensation of moral harm is a fascinating story of evolution of private law, spanning two centuries and touching upon the very core moral and social grounds for regulating tort liability still vital today.

**French law**

French civil law, established in the Napoleonic Code, had an overbearing influence over nineteenth-century civil law scholarship, especially in Western and Southern Europe; the Napoleonic Code was adopted not only in France, but also in Belgium and parts of Germany, and laws directly following it were adopted in the Netherlands, Spain and Italy. It was also briefly in force in the so-called Illyrian Provinces (territories of Croatia and Slovenia), introduced under French influence during the Provinces’ temporary loss by Austria. In Poland, the Napoleonic Code was adopted in the territories of the Duchy of Warsaw, under Article 69 of its Constitution. As we know, this solution – despite French law being generally alien to Polish tradition – proved to be permanent, having survived in Congress Poland well until the 20th century. Moreover, French law had been adopted and in force in the Republic of Cracow until 1855.

The Napoleonic Code plainly distinguished between delict (tort) claims and contractual claims in Part 2 of Title IV of Book III, entitled “On delicts and quasi-delicts”. Arguably this was an approach more modern than the one taken by ABGB. This, however, was coupled with the relevant provisions being significantly laconic – the very same part of the Code, comprising only six articles (Articles 1382 through 1386), regulated liability for animals, negligent supervision and negligent choice, as well as for liability for damage caused by the poor condition of edifices. As a result, the substantive basis for all delict claims was Article 1302 CN; it was supplemented by the content of Article 1383, further to which negligence or imprudence was tantamount to intent. Such a resolution, consistent with the approach of contemporary legislation, distinguished French law from Austrian law, in which the degree of culpability could play an important role for the very occurrence of liability and grounds thereof.

As L. Domański aptly stated over 100 years later, possibly reflecting a common opinion, “the laconic text of Article 1382 of the Civil Code raises many doubts and interpretative difficulties, both in jurisprudence as well as and for the scholars”. French scholars explained this by indicating that Article 1382 in fact only comprises a sanctioning rule, not general grounds for prohibiting inflicting harm upon others – such, in turn, was supposed to stem from the nature of the law and the general prohibition of violating others’ rights. Simultaneously, Napoleonic Code lacked other specific rules that would provide for the grounds for seeking redress in specific situations. Such general regulation of tort liability shifted the burden of clarifying its scope to the jurisprudence.

As regards the approach to the recovery of nonpecuniary damages, there was, in effect, a growing discrepancy between the case law in France and the Kingdom of Poland. In France, the possibility to seek material compensation for moral damages (dommage moral) had become widely accepted over time, owing to the local legal tradition, dating back to the 17th Century, as well as in the achievements of the school of natural law. Starting in 1830s, the French case law gradually expanded the classes of situations where claims of this kind were recognized.

In the 1920s, it was ultimately accepted that Article 1382 CN could constitute a general grounds for claims for compensation related to a very broadly defined nonpecuniary damage; for instance, claims for mental suffering related to the injury suffered by another person were awarded. This provision could also provide a basis for claims against the state, e.g. for unjustified arrest. Moreover, despite the wording of Article 1149 CN, also allowed under Article 1382 CN were claims for compensation for nonpecuniary damage resulting from contractual relations (Article CN).

---

1 The authors believe that both terms may be used interchangeably as long as the context makes it clear that there is a distinction between common law torts and civil law delicts.
2 Hereinafter also referred to as: “CN”.
3 French law remained in force after Cracow had been annexed by Austria; it was replaced by ABGB further to an imperial patent of 23rd March, 1852, RGBl. 1852 no. 77; however Austrian marial law was introduced in 1852. See: D. Malec, *Wprowadzenie Kodeksu Napoleona w Departamencie Krakowskim Księstwa Warszawskiego w świetle relacji „Gazety Krakowskiej”* (in:] A. Drabik, S. Grodziński (eds.), *Regnare, gubernare, administrare. Prawo i władza na przestrzeni wieków: prace dedykowane profesorowi Jerzemu Malcowi*, Warszawa 2010, p. 52.
4 Vicarious form of liability resulting from careless action of man whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof. English translation as per: W. Benning (publisher), *Code Napoleon; or, The French Civil Code. Literally Translated from the Original and Official Edition, Published at Paris, in 1804*.

---

8 L. Domański, *op. cit.*, p. 68.
9 The first time compensation for moral damages was awarded with reference to Article 1382 CN was by a judgment of the Court of Cassation of 15.06.1833 in a case of an action brought by two pharmacists suing a person who unlawfully practiced the profession. See: Cass. Civ. S.1833, I, 458.
12 The damages and interest due to the creditor are, in general, to the amount of the loss which he has sustained or of the gain of which he has been deprived; saving the exceptions and modifications following.
13 Every obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor.
The French doctrine, given the literal wording of Article 1382, stated in a very modern manner that the pecuniary sum awarded was to constitute "a kind of compensation enabling unpleasantness to be relieved by pleasure" and was therefore not tantamount to a penalty or composition. However, due to the immeasurability of non-pecuniary damage, objections were raised—especially in view of the Code's provision regarding the necessity to "compensate the damage", and, therefore, the need to quantify the damage in monetary measures. The unwillingness to allow this issue to be decided by precedent provided for considerable discretion in judicial power in this matter, resulting e.g. in the practice of granting of symbolic damages, in the token amount of one franc. As a result, the flexibility of case law and existing norms has allowed for the admissibility of seeking compensation for all kinds of psychological inconvenience and even for marital infidelity: this undoubtedly stemmed from a general trend that "the French Civil Code, since 1804, has favoured the position of the injured party, relieving him in certain cases even of the requirement to prove the perpetrator's fault and introducing numerous presumptions of fault". It was also recognised that legal persons (including, for example, trade unions) may seek redress for violations of the rules of professional ethics, their honour or good reputation under Article 1382.

As a result, despite the controversies and doubts outlined above, the French legislation has been gradually considered to be the most favourable as regards the claims for non-pecuniary damages' compensation, both in terms of the broad grounds for actions as well as the amounts of damages awarded—although such a far-reaching interpretation of Article 1382 CN was contrary to the original intentions of its drafters.

The curious case of French law in Poland

In the Kingdom of Poland (Congress Poland), unlike in France, throughout the entire 19th Century, neither jurisprudence nor scholars of law deemed claims for material compensation of moral damages to be admissible. At the same time, this issue was not widely discussed in practice, even though it was acknowledged that Article 1382 applied to all unlawful damage inflicted culpably, including non-pecuniary damage.

The departure from this position arose only in the last years preceding the First World War. The breakthrough was the judgment of the Civil Cassation Department of the Ruling Senate of 1909. It recognised the recoverability—indeed with material damages—of non-pecuniary damages for harm caused by physical disability. As a result of this judgment, the case-law began to accept actions brought for compensation for non-pecuniary (moral) damage, provided that such damage was directly related to material damage caused.

The category of relationship between these damage types was understood broadly. For instance, the Supreme Court of the Kingdom of Poland in its judgment of 14.12.1917 contended that in the case of the death of a son, the non-pecuniary harm of his parents is related to the material damage in the form of loss inflicted against them with respect to their prospects for financial support to be received from the son in the future—and therefore compensation should be granted. Similar views were expressed in subsequent decisions of the Polish Supreme Court, issued under the Napoleonic Code, e.g. in the judgment of 25 February 1924. In it, the Supreme Court held that "damage caused to a person who has suffered a disability is expressed not only in material damage connected with his total or partial loss of ability to work, but also in other detrimental consequences of disability, just as compensation for damage and loss to be merely a substitute for the goods that the injured person has been deprived of, which the perpetrator of the damage is supposed to provide, then all this cannot apply to moral damage, for here, on the one hand, material damage can amount to nothing, or in any case be completely elusive, and on the other hand, the insubstantiality of such goods (right to love, etc.) that the highest monetary payment cannot be equivalent to them. This is where the social character of compensation for damage and loss appears, as a check against bad will, as a means of protecting other people's rights, as a, at least subsidiary, manner of coercing to respect them. And in this sense, the compensation of moral damage and loss deserves the warmest possible support."


J. Matys, Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym, Rozdział 1.4.3.2, LEX/el.


J. Matys, Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym, Rozdział 1.4.3.2, LEX/el.

See e.g.: Z. Justman, O wynagrodzeniu szkód i strat [in:] Rocznik Prawników Kaliskich za lata 1903 i 1904, Kalisz 1906, p. 15: Can moral damages be compensated at all? I dare say not. If we consider
severe and oftentimes irrecoverable, such as health disorder, disfigurement, the reliance on care of others and in general impairment of ability, rendering living conditions more or less difficult“, and that “Article 1382 CN provides for total compensation for each culpable act of a person causing harm to another“ – and, therefore, regardless of the difficulty of calculating it, the injured party should be compensated for non-pecuniary damage.

Nevertheless, at the time that Poland regained independence, the idea of a general and common practice of awarding compensation for non-pecuniary damages was a novelty in the jurisprudence of Congress Poland and among its legal scholars, a novelty still not widely acclaimed – one which even later was refuted or interpreted in a restrictive manner 32.

French law in other European countries

An understanding of liability for non-pecuniary damages similar to that developed in France was adopted in the jurisprudence of many other European jurisdictions in the 19th century, those whose legal systems were influenced by the French civil law – as well as outside of Europe, especially in South America and Louisiana 33. In Belgium, where the Napoleonic Code had been in force continuously since its inception, the admissibility of claiming compensation for non-pecuniary damages under Article 1382 was finally recognised in 1881 34.

French law was also introduced to a large part of the Italian lands, where the Napoleonic Code was first introduced directly, as a result of conquests of the Emperor of the French; after his fall, separate codifications were introduced in the following decades of the 19th century, modelled directly after the Napoleonic Code (in the Kingdom of Two Sicilies in 1819, in Parma, Piacenza and Guastalla in 1820, in the Kingdom of Sardinia in 1837). Such a resolution may have been inspired by political considerations – Austrian law, introduced in Lombardy and Veneto after 1815, was treated as foreign and forcefully imposed 32.

A new codification, however, also modelled after the Napoleonic Code, was the Pan-Italian Civil Code of 1865 (the so-called Pisanelli Code). Structured in a manner remarkably similar to that of the French statute, in its Articles 1151 and 1152 it provided for the obligation to repair damage in the same way as Articles 1382 and 1383 of the Napoleonic Code. Just as in the case of France, the laconic nature of these provisions resulted in scholarly controversies. Initially, resting well under French influence, the Italian jurisprudence allowed for recoverability of claims for compensation for non-pecuniary damage (danno non patrimoniale, danno morale), stressing simultaneously that, since the law – indisputably protects property against unlawful infringements, it cannot be maintained that, in absence of such a reservation, moral goods (rights) shall remain unprotected; the compensation for non-pecuniary damage should also not be barred by the difficulties in calculating its value 34.

At the beginning of the twentieth century, however, under the influence of German scholar, the opposing view gradually took precedence 32; the view stemmed from a literal, restrictive reading of the provision as well as of the concept of damage (danno), identified with damage to property 32. This view influenced the content of Article 2059 of the contemporary Italian Civil Code of 1942, further to which compensation for non-pecuniary damage may be claimed only in cases where the law thus stipulates. This is analogous to the provision of § 253 BGB and Polish law both pre-war and contemporary (though contemporary Polish law nowadays employs the wide, evolving and ever-broadening catalogue of personal rights as a reference anchor to build the list of cases where moral damages are actionable; see below). Italian jurisprudence had originally interpreted this provision as to award moral damages only in cases of torts that had simultaneously been adjudicated as crimes (per Article 185 of the Italian Criminal Code, stating that every unlawful act that caused material loss or non-material harm gives rise to an obligation to redress such loss or harm), yet this reading of Article 2059 of the Italian Civil Code has evolved, with the courts now awarding moral damages in cases where basic constitutional rights had been infringed 33.

The Spanish Civil Code of 1889 (Código Civil), still in force until as of today, and, just as the Italian code, directly influenced by French law, centers its regulation of delictual liability on its Article 1902, which is a copy of Articles 1382 and 1383 CN. However, unlike in France, the Spanish case-law, consistent in this with its domestic legal tradition, initially ruled out the possibility of awarding monetary compensation for non-pecuniary damage (daño moral) pursuant to the above-mentioned provision, as described by the Spanish Supreme Court (Tribunal Supremo) in its judgment of 11 March 1899 33.

The above approach changed significantly only after the judgment of that Court of 6 December 1912 34. This

---

32 See e.g.: A. Grybowski, Powództwo cywilne według k.p.k., „Głos Sądowosci”, nr 1, Warszawa 1930, pp. 20-21 – who declares that CN does not allow the recoverability of damages for insult to reputation.
34 Judgment of the Court of Cassation (Cour de Cassation), Cass. 17.03.1881, Pas.1881, I 163.
35 N. Coggiola, The Influence of Foreign Legal Models on the Development of Italian Civil Liability Rules from the 1865 Civil Code to the Present Day, „The Italian Law Journal”, vol. 05 (02), 2019, pp. 442-443
37 Thus e.g.: G. Pacchioni, Corso di diritto civile italiano, Padova 1940, p. 85.
40 Case no. STS 142/1912; the case dealt with compensation for moral damages incurred by slander by a scandalous, and, as the evidentiary proceedings showed, false statements made by the “El Liberal" newspaper
breakthrough therefore took place at the same time as a change in the trend of case law in Congress Poland (see above). Only from this point in time on the recoverability of non-pecuniary damage under the general rules of civil law is undoubtedly accepted in Spain⁴¹.

However, it was not in every jurisdiction where French law was in force that the jurisprudence took the same path regarding moral damages. In those German lands where the Napoleonic Code, or legislation inspired thereby, was adopted (e.g. Prussian Rhineland, Baden, Hessen), the admissibility of pecuniary compensation for non-pecuniary damages was consistently rejected⁴². The local German jurisprudence and scholars adopted a similar stance;⁴³ remaining faithful to the Germanic tradition, it was argued that awarding financial compensation for non-pecuniary damage would constitute an unlawful act, and one sanctioning private penalties (Privatstrafe), admissible under ius commune, but not in the Napoleonic Code⁴⁴.

Nevertheless, it can be stated that the French broad, liberal approach toward compensation for non-pecuniary damage was ultimately adopted in most of continental Europe – in contemporary Polish civil law as well.

Polish law

The first entirely Polish modern legislation regulating contract and tort law – the Code of Obligations of 1934⁴⁵ – took a developed approach toward moral damages inflicted though tort. General rules pertaining to damages (compensation) comprised Articles 157 through 167.

A post-war judgment given right after the introduction of the modern Polish Civil Code (which led to the repeal of the Code of Obligations) but pertaining to a tort that took place when PCO was in force, accurately described the difference between material damages and moral damages as understood under PCO: just as the first kind of damages are to compensate loss which is strictly material, by reimbursement of pecuniary amounts already borne or predicted to be borne, moral damages under Article 165 § 1 of the Regulation (PCO) are aimed at compensating, at least to some extent, the harm other than material loss, consisting of negative feelings both physical and psychological, caused by pain, disability or the awareness of one’s impairment.

Material loss, as per Article 157 § 1 had been divided into actual loss (damnum emergens) incurred by the injured party and loss of profit (lucrum cessans) encompassing profit that the injured party could have expected to gain had they not been harmed⁴⁶. Third section of Article 157 stated that irrespective of material loss, the injured party may claim damages for moral damage – but, as it was underlined, only where the law provided therefor. We can see, therefore, that the recoverability of moral damages had been limited to cases directly mentioned in the law, without the law creating a general grounds for moral harm compensability like the wide and umbrella-like reference to personal rights’ infringement and moral harm stemming therefrom as it is the case under the currently binding Polish civil law (see infra). Moral damages were awarded (and paid) in money – under the assumption that although physical pain or psychological harm cannot be directly quantified in money, it is feasible to calculate such an amount of money that obtaining it would cause the harmed person joy more or less equivalent to the sustained harm⁴⁷. The courts could award one global sum as moral damages, without any necessity to separately state the amount owing to physical suffering and to moral (psychological) harm⁴⁸.

The Code of Obligations itself regulated the most important cases where moral damages were to be actionable. In Article 165, its first section stated that in cases of bodily harm, health disorder, loss of life, deprivation of liberty or insult to dignity, a court may award the injured party damages for physical suffering and moral harm. Interestingly, the Polish Supreme Court interpreted moral harm quite broadly, as to encompass the loss (due to a child’s death) of a parent’s hope for future care and nurture (to be eventually received from the child)⁴⁹.

Apart from the grounds for actionability of moral damages listed above, § 2 of Article 165 stated that the rule of § 1 was to apply accordingly to cases where a woman, a minor or a mentally impaired male was forced to commit an indecent act by deception, assault, abuse of dependency relation or taking advantage of the injured party’s critical situation.

Moreover, the closest family members of a person deceased due to bodily harm or health disorder caused by another could claim moral damages (Article 166 PCO), irrespective of whether the tortfeasor had been at fault⁵⁰. However, the rule was interpreted as to allow the courts to decline moral damages claims where moral harm had been

---

⁴¹ C. von Bar, Non-contractual Liability Arising Out of Damage Caused to Another, Munich 2009, p. 329.
⁴² T. Giaro, Czy w przewidywalnej przyszłości powstanie europejskie prawo zobowiązań?, „Forum Prawnicze” no. 1 (1), 2010, p. 82.
⁴³ E.g. as regards the Baden Landrecht of 1809, a de facto translation of the Napoleonic Code, commentators had, since its adoption, underlined that Article 1382 does not allow for a non-pecuniary claim: Böy persönlichen Beschädigungen bleibt die Entschädigung in den Herstellungskosten und in dem entbehrten Verdienst des Beschädigten: Schmerzengeld kann nicht gefordert werden. Thus: Code Napoléon: mit Zusätzen und Handelsgesetzen als Landrecht für das Großherzogthum Baden, Karlsruhe 1809, p. 376.
⁴⁵ Regulation of the President of the Republic of Poland of 27th October, 1934 – Code of Obligations (Journal of Laws of the Republic of Poland of 1934 no. 82 item 598 as amended, hereinafter referred to as: Code of Obligations, PCO).
⁴⁶ See e.g. the judgment of the Polish Supreme Court of 30.12.1936, case no. C II 1934/36, where the owner of a goat bitten by a dog was awarded compensation not only for the market value of the goat and the costs of her healing, but also for the value of milk for the time between the event and the moment that the tortfeasor liable for the dog offered to the goat herder compensation encompassing the value of the goat.
⁴⁹ Judgment of the Polish Supreme Court of 15th January, 1937, case no. CII. 2097/1936.
⁵⁰ See e.g.: Judgment of the Polish Supreme Court of 29th November, 1936, case no. CII. 1998/36.
minimally51. Interestingly, the provision of Article 166 PCO allowed the family to claim compensation not only for themselves, but also demand that damages be awarded to an institution chosen by them. Jurisprudence interpreted the notion of closest family as to encompass – not surprisingly – parents or children, but to exclude concubines, extramarital children not legitimized, or other even close, relatives52. Courts – as is the case nowadays – would attempt to quantify the moral harm also by assessing whether a claimant had in fact had a real emotional relation with the deceased53.

Another area where moral damages were treated differently than material damages in Polish law was that claims for moral damages were, in general, not inheritable. Moral damages’ claims as ones strictly related to the injured person and aimed at protecting only such person’s interests, were said to be justifiably inheritable only in certain precisely indicated cases54. Would pass on to the injured person’s heirs only if recognized in a contract (settlement) or awarded in an un-appealable verdict while the injured person was still alive (Article 165 § 3). In cases of bodily harm, health disorder, loss of life, deprivation of liberty or insult to dignity (i.e. those listed in Article 165 § 1) sufficient for such claims to be inherited was that action be brought during the injured person’s life. Similarly, claims for damages (material or moral) could not, under the Code of Obligations, be assigned to third parties, unless recognized in a contract (settlement) or awarded in an un-appealable judgment – and, in all cases, only when already due.

Aside the Code of Obligations, there were other statutes enacted which contained provisions allowing for actions for moral damages to be brought, among them the most important – the Code of Criminal Procedure in cases of wrongful conviction or false accusation and the statutes on intellectual property (the act on copyright, patent law, design and the statutes on unfair competition law). Aside the Code of Obligations, there were other statutes enacted which contained provisions allowing for actions for moral damages to be brought, among them the most important – the Code of Criminal Procedure in cases of wrongful conviction or false accusation and the statutes on intellectual property (the act on copyright, patent law, design and the statutes on unfair competition law).

Initially, after the Civil Code of 196455, which repealed the Code of Obligations, was passed, the statutory model of moral damages’ actionability and recoverability was similar to the Code of Obligations’ regulation. The new law maintained the general overriding principle that moral damages may be claimed only in cases where the law stipulates so. Article 445 § 1 PCC stated that in cases of bodily harm or health disorder the court may award the injured person with a proper monetary compensation for the harm sustained. As Article 445 § 1 referred to Article 444 § 1, one which defines the extent of damage covered by compensation for bodily harm or health disorder56, scholars have noted that the obligation to repair moral damages arises without prejudice for the bases of liability in a given case (i.e. whether dealing with a general fault delict or strict liability, one’s own delict or vicarious liability etc.). § 2 of Article 445 expanded the liability for moral damages to cases of deprivation of liberty and inducement of a woman by deceit, violence or abuse of a dependency relation to submit to an indecent act. We may see, than, that in cases of sexual integrity, the Civil Code has narrowed not only the catalogue of injured persons able to claim compensation for moral damages to women only (depriving male minors and mentally impaired men of such form of protection), but also the list of grounds for potential liability, by crossing out of it the abuse of one’s critical situation61.

Generally, both jurisprudence and scholars of Polish law agreed that moral damages cannot be awarded to redress negative psychological implications of material loss, e.g. one’s stress or disappointment resulting from losing a sum of money62. On the other hand, health disorder was interpreted broadly, covering conditions of serious psychiatric disorder caused by events to which the law ascribes delictual liability, e.g. immense stress arising from misdiagnosis53. Moral damages could have been awarded both alongside material damages as delimited in Article 444 § 1 PCC, as well as in cases where the injured party failed to prove material loss despite suffering and infringement of personal rights64. The most important between the Civil Code as enacted in 1964 and the Code of Obligations was the abolition of the rule of Article 166 PCO, one that had no equivalent in Civil Code. Hence, the family of a deceased person could not claim any moral damages from the tortfeasor, though they could bring action for material loss. Financial compensation for moral harms, especially ones

53 See e.g. the judgment of the Polish Supreme Court of 15th January, 1937 (quoted above), where the Supreme Court decided, against the appellants argument, that the fact that the plaintiffs deceased son was killed when he was six offered sufficient time for the plaintiff to establish an emotional relation with the son.
54 R. Longchamps de Berier, op. cit., p. 295
55 Article 650 of the Regulation of the President of the Republic of Poland of 19.03.1928 – Code of Criminal Procedure (Journal of Laws of the Republic of Poland o.1928 no. 33 item 313 as amended).
56 Ibidem, Article 658.
57 See Art. 23.04.1964 – Civil Code (Journal of Laws of the Republic of Poland of 1964 no. 16 item 93 as amended), hereinafter referred to as “PCC”.
59 Article 444 § 1 reads: In the case of a bodily harm or a health disorder the redress of the damage shall include all expenditures resulting from it. At the request of the injured party, the person obliged to redress the damage shall lay out in advance an amount required to cover the treatment costs and where the injured party has become a disabled person, an amount required to cover the costs of training for another profession as well.
61 Arguably, this development was consistent with the political context of the new Code, as the propaganda dimension of the law in a socialist state would not allow the slightest suggestion that anyone could be in a critical situation in a country of common happiness and economy of surplus.
63 Article 178/69.
64 Thus: A. Szpunar, Zadośćuczynienie za szkody majątkowe, Bydgoszcz 1999, pp. 77 et seq.
related with the loss of life, was deemed inconsistent with the political context of the Code’s enactment.\(^5\)

To date, the most serious expansion of liability for moral damages happened in 1996 by a substantial change in the wording of Article 448 PCC.\(^6\) This provision, which previously read that in cases of intentional infringement of personal rights the injured person may have demanded, without prejudice for other means necessary to redress the damage sustained,\(^7\) that the tortfeasor pay an appropriate amount to the Polish Red Cross, was modified to allow injured persons to claim moral damages in any and all cases of personal rights’ infringement. Hence, since 1996 the Polish courts were allowed to award an appropriate monetary sum (moral damages) to a person whose personal right had been infringed (alternatively, the injured person may demand that the appropriate sum be awarded to a community purpose chosen by that person). Personal rights are understood as certain essential values of emotional or psychological significance to humans, commonly accepted in society, ones which every human is born.\(^8\)

Hence, since 1996, monetary moral damages may be claimed by the injured party in all cases of personal rights’ infringement. Commentators have indicated that though the reform introduced to the Civil Code of a vast grounds for actions for pecuniary moral damages, it does not lead to the renunciation of the principle that moral damages may be claimed only when provided for in law.\(^9\) However, even a superficial analysis of Article 448 PCC in the context of Polish case-law concerning personal rights, showing how vast the catalogue of moral rights is and what values these protect, shows that the admissibility of moral damages under Polish law is very broad, pertaining to almost all conceivable delicts (inevitably related with an infringement of personal rights such as health, freedom, dignity, personal image, privacy, property, sexual and psychological integrity, reputation of a deceased person and numerous other examples crafted by case-law). The remarks made above as to the required relation between an infringement of such rights and moral damages owed as well as the lack of necessary connection between successful proof of material loss and actionability of material damages apply also to Article 448 PCC post-1996. Hence, the discussed provision is a powerful instrument available to claimants. Apart from broadening the bases for moral damage claims, the 1996 statute expanded the extent of persons entitled to recover moral damages for tortious infringement sexual integrity as to almost encompass men.

Another vital change of Polish moral damages’ regulation came in 2008, when Polish legislation reintroduced provisions allowing for recoverability of moral harm inflicted against a deceased person’s family, first time since the Code of Obligations and its Article 166 had been repealed. A statutory amendment\(^1\) to the Polish Civil Code added § 4 to Article 446. The section in question reads that a court may grant damages to the closest family members of the deceased as pecuniary compensation for the wrong suffered. This change, effected almost 18 years after the first serious modifications of civil law after the economic and social transformation, is a late but welcome development – consistent with the general trend of expanding monetary instruments of non-material interests’ protection. Arguably, a system where parties can claim monetary compensation for any infringement of any personal rights, even those of a secondary nature, while they could not expect that the harm connected to the death of a close family member, does not score well on coherency and justice measures. Though scholars and jurisprudence submitted that such interests were already protected, as harm sustained through the death of a family member could have been recoverable employing the protection covering personal rights under Article 448, rights such as like the right to family life,\(^2\) emotional relations and “a sense of closeness”,\(^3\) and even though the real operation of Article 446 § 4 PCC was a scholarly controversy, with some arguing that the new clause is but a verbosity recapturing the principle of protection of interest already protected, it is submitted that even a purely clarifying meaning of the rule is much needed, in the context of a possible creeping abrogation of protection of personal rights related to family ties.\(^4\) Judges are apparently convinced similarly, as case-law clearly attempts to interpret the rule in a manner friendly to the injured parties.\(^5\)

Discussion and conclusions

The discipline of tort law is both inspiring in that it deals with redressing damage – the art of compensating somebody, giving unto them what they lost by an act of another – and dismal in that tort law must, at some point at least, decide what kinds of wrongs shall be allowed to be

---

\(^{6}\) Judgment (resolution passed by seven judges) of the Polish Supreme Court of 1-15.12.1951, case no. C. 15/51.


\(^{8}\) This pertained to legal instruments of personal rights’ protection ascribed in Articles 23 and 24 PCC.


\(^{10}\) B. Lanckoroński, Glossa do uchwały SN z dnia 12 grudnia 2013 r., III CZP 74/13, OSz 2015/2/15.

\(^{11}\) All former mentioned in Article 23 PCC.

\(^{12}\) Act of 30.05.2008 amending the Civil Code (Journal of Laws of the Republic of Poland of 2008 no. 116 item 731).

\(^{13}\) See e.g.: Judgment of the Polish Supreme Court of 11.05.2011, case no. I CSK 621/10.

\(^{14}\) See e.g.: the Court of Appeals in Lublin (Sąd Apelacyjny w Lublinie) in the judgment of 16 January 2013, case no.: I AGa 6/94/12.

\(^{15}\) Thus: P. Sobolewski [in]: K. Osajda (ed.), op. cit., commentary to Article 446, nn. 59.

\(^{16}\) See e.g. in the context of marital infidelity: K. Bokwa, I. Jarosz, Monetary compensation for marital infidelity and damages resulting therefrom in comparative perspective, Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne 29 (2019), pp. 159-171.

\(^{17}\) See e.g. the judgment of the Polish Supreme Court of 5.10.2011, case no.: I CSK 10/11, concerning the claims of family members of a person injured in March 2008 (prior to the entry into force of the new rule) who died in October 2008 (after the law had been in force). The Supreme Court granted the family damages.
recovered and which are not to be addressed by the law, and must hence be accepted by the injured party. Tort law norms stem from common convictions as to who – and to what extent – must bear damage, or even whether a given kind of damage may be at all recovered; or maybe they should be borne by the injured party.

Though legal instruments aimed at granting relief to parties who sustained material losses (both positive – damnum emergens – and negative – lucrum cessans) existed since the dawn of private law, it was not exactly the case with immaterial damage. Scholars and commentators note that the development of modern civil law is such that it increasingly tends to address the issue of non-material losses. It is a development both welcome and much needed. The modern sharing economy concentrates on legal instruments giving grounds for temporal use of someone else’s property. Simultaneously, such property, rented out (in an economic sense), will probably be increasingly protected by insurance. We may, in the coming decades, witness the placement less weight on property, and, in consequence tort – as, historically, a set of norms interested principally with damage to property (and person – as long as the damage was material). Correspondingly, in future we shall see decades we shall see an even larger role of non-material damage and its legal protection.

How exactly will the law evolve is obviously yet to be seen. Our strength is that we may base our expectations, knowledge, and predictions on historical development of the law. French law of tort, discussed in this text, has been one of the first to recognize non-material damages and deem them admissible, liberal in allowing injured parties’ claims for moral damages. Important to underline is the pioneering role of judge-made law. The French approach toward moral damages was born out of judicial activism in interpreting laconic provisions of the law. It is vital to notice that in the context of possible social changes and how such may be addressed by the law.

Polish jurisprudence and legal doctrine, initially wary of allowing the admissibility of claims for moral damages even in the territory of Congress Poland, where French law was in force, has seen its stance toward moral damages evolve in the 20th century from the position of distrust, with moral damages seen as a novelty void of general acclaim, through an increasing acceptance up to the point where Polish legislation crafted one of the most liberal legal orders as pertains to the recoverability of moral damages in tort, one where the infringement of any right from an open, wide and developing catalog of personal rights may give rise to tortious claims.

How will the civil law evolve from this point on, in Poland, in France and in jurisdictions based on or at least inspired by French law? The question is open, but whatever the answer, scholars and practicing lawyers might find solace in realizing that the debates of today and the controversies of tomorrow will possibly still reflect the arguments of yore.

References
- Code Napoléon: mit Zusätzen und Handelsgesetzen als Land-Recht für das Großherzogthum Baden, Karlsruhe 1809
- von Bar C., Non-contractual Liability Arising Out of Damage Caused to Another, Munich 2009
- Chlantac M., Sposoby wynagrodzenia szkody w polskim kodeksie zobowiązań i w prawodawstwach nowożytnych [in:] Księga pamiątkowa ku czci Leona Pinisńskiego: Tom I, Lwów 1936
- Coggiola N., The Influence of Foreign Legal Models on the Development of Italian Civil Liability Rules from the 1865 Civil Code to the Present Day. „The Italian Law Journal,” vol. 05 (62), 2019
- Delsol J.J., Zasady i nauki Kodeksu Napoléona w związku z nauką i jurisprudencją przedstawione, Warszawa 1874
- Domański L., Wykładnia art. 1382 kod. cyw. (odpowiedzialność za krzywdu moralne), „Kwartalnik Prawa Cywilnego i Karnego”, Warszawa 1919, R.II, pp. 64-74
- Dutka P., Zadośćuczynienie za krzywdu moralne w okresie międzywojennym ze szczególnym uwzględnieniem ustawodawstwa australijskiego, „Studia z Dziejów Państwa i Prawa Polskiego”, XX – 2017
- Ebert I., Pōnene Elemente im deutschen Privatrecht. Von der Renaissance der Privatstrafre im deutschen Recht, Tübingen 2004
- Giaro T., Czy w przewidywalnej przyszłości powstanie europejskie prawo zobowiązań?, „Forum Prawnicze” no. 1 (1), 2010
- Grzybowski A., Powództa – cywilne według k.p.k., „Głos Sądownictwa”, nr 1, Warszawa 1930
- Gutowski M. (red.), Kodeks cywilny. Tom I, Komentarz do art. 1–352, Legalis/el/2018
- Holewiński W., O zobowiązaniach podłog Kodeksu Napoléona: wykład tytułu III i IV książki trzeciej, Warszawa 1975
- Jarra E., Glosa do orzeczenia Sądu Cywilnego z 18 stycznia 1935., C.II. 2229/34, Przysięgnotecznictwo Sądów Polskich 1935
- Justman Z., O wynagrodzeniu szkód i strat [in:] Rocznik Prawników Kaliskich za lata 1903 i 1904, Kalisz 1906
- Lackorofalski B., Glosa do uchwały SN z dnia 12 grudnia 2013 r., III CZP 74/13. OSP 2015/2/15
- Litauer J.J., O zadośćuczynieniu za krzywdu moralne ze stanowiska prawa cywilnego, „Themis Polska”, Warszawa 1913, t. 1
- Longchamps de Berier R., Polskie prawo cywilne. Zobowiązania, Lwów 1938
- Marińskis M., Zielinska M., Pojęcie szkody przyszłej: „prejudice futur” w prawie francuskim. Rozważania na tle polskich uregulowań prawnych, „Studia Prawnoutrójstowowe” no. 28
- Matys J., Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym, Warszawa 2010
- Młynarski T., Zadośćuczynienie pieniężne z art. 448 k.c. w razie śmierci osoby bliskiej w kontekście postanowienia Sądu Najwyższego z dnia 27 czerwca 2014 r. (III CZP 2/14), „Rozprawy Ubezpieczeniowe” nr 17 (2/2014).
Fundamental and applied researches in practice of leading scientific schools - ISSN 2708-0994

Volume 40, Number 4, 2020

- Osajda K. (red.), Kodeks cywilny. Komentarz, Legalis/el 2019
- Pacchioni G., Corso di diritto civile italiano, Padova 1940
- Palmer V. V. (ed.), The Recovery of Non-Pecuniary Loss in European Contract Law, Cambridge 2015
- Panowicz-Lipska J., Majątkowa ochrona dóbr osobistych, Warszawa 1979
- Planiol M., Traité Élémentaire de Droit Civil, Paris 1907
- Salvadori F. C., Il danno non patrimoniale: evoluzione storica e prospettive future, Venezia 2011
- Sękula M., Problematyka zadośćuczynienia pieniężnego za szkodę niemajątkową, Radca Prawny 2008, nr 2
- Strus Z., Ortyński K., Pokrzywiak J., Zadośćuczynienie po nowelizacji art. 446 Kodeksu cywilnego na tle doświadczeń europejskich, Warszawa 2010
- Szpunar A., Zadośćuczynienie za szkodę majątkową, Bydgoszcz 1999
- Walaszek B., Charakter roszczenia o zadośćuczynienie za krzywdę moralną, „Współczesna Myśl Prawnicza”, nr 4 (19), 1937
- Zachariä von Lingenthal K. S., Handbuch des französischen Civilrechts, Band II, Heidelberg 1853
- Zoll F., Zobowiązania w zarysie według polskiego kodeksu zobowiązań, Warszawa 1948

Volume 40, Number 4, 2020
17