Poland

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Liability for damages is one of the most important social issues regulated by law. Everyday situations, such as car accidents, damage caused by an animal, or defective products, are examples of damaging events. Compensatory liability also occurs in professional activities, such as the liability of managers for exceeding acceptable economic risk, liability for exceeding environmental quality standards for noise emissions, or liability of the ordering party for violating public procurement rules.

Issues related to economic and non-economic damage are intrinsically connected with the need to identify a specific third party responsible for the damage caused. Determining responsibility plays a crucial role in the compensation process, as it ensures that the party who caused the harm, whether directly or indirectly, is held accountable. For economic damages, the focus is on financial impact, and this type of damage is usually easier to quantify. Non-economic damage presents more challenges, as it deals with subjective and often intangible consequences of harm. This may include pain and suffering or emotional distress. These damages are usually more complicated to measure but can significantly impact the injured party's well-being and quality of life.

It is necessary to determine all relevant circumstances to compensate for damage that has occurred. Legal systems must provide clear frameworks for determining damages liability, ensuring that injured parties receive appropriate compensation for both economic and non-economic harm. The Polish Civil Code[1] provides several rules for determining who is responsible for the event causing the damage and to what extent.

A. Outline of the Polish Legal System

The Polish system is a civil law system. Such systems are characterized by a legal order based on codified legal norms. Parliament is the sole legislator, and the role of the judge is limited to interpreting previously enacted laws and applying them to a particular factual situation.

In the continental system, judges do not create the law, but only interpret it. The principle of precedent does not apply. Each judge is, in theory, completely independent of previous rulings in similar cases. Even the decisions of the Supreme Court are not expressly binding on every case in other courts, with some exceptions. The origins of the codification of law go back to Roman times - Roman law is one of the most important subjects taught in the first years of legal studies at Polish universities.

According to Article 87 of the Constitution of the Republic of Poland, the sources of generally binding law in Poland are the Constitution, statutes, ratified international agreements, and regulations. Acts of local law are binding within the territory of the local government that adopted them.

B. Damage in Polish Law

The Civil Code is the primary source of regulation of liability for damages in Poland. According to Article 361 of the Civil Code, "[t]he person liable for damage shall be liable only for the normal consequences of the act or omission from which the damage arises. Within the above limits, in the absence of a provision to the contrary in the law or in the contract, remedy for damage shall include the

[1] Act of Apr. 23, 1964, Journal of Laws 1964 No. 16, item 93.

loss that the injured party has suffered and the benefits that he could have achieved had he not suffered the damage."

The dogmatic classification of damage is based on the criteria of its consequences. A distinction is made between economic and non-economic damages. Economic damages may include the actual loss suffered by the injured party and lost profits it could have obtained if the damage had not been caused to them.[2] Actual loss (*damnum emergens*) consists of a reduction in the assets of the injured party (including those caused by an increase in liabilities) due to the event to which the liability of the person causing the damage is linked. In contrast, lost profits (*lucrum cessans*) occurs when the assets of the injured party have not increased as they would have if the causal event had not occurred.[3]

Non-economic damage is specific. For non-economic damage, the injured party can claim compensation (*zadośćuczunienie*). An example of such an event is a health impairment. According to Article 444(1) of the Civil Code, "[i]n the case of bodily injury or infliction of health disorder, compensation for damage shall include all resulting costs." In such a case, the court may award the injured party an appropriate amount of money as compensation for the harm suffered. Compensation awarded under Article 445(1) of the Civil Code is compensatory in nature, redressing non-economic damages like physical and mental suffering. The amount of monetary compensation due is determined by the extent of the harm suffered, that is the degree of suffering (its intensity, duration, irreversibility of consequences, and other similar circumstances).[4]

C. Legal Basis for Damage Claims

Liability for damages is divided into different categories (types), which directly determines the legal basis for damage claims. Depending on the origin of the obligation the following (non-exhaustive) distinction can be provided:

- non-performance or improper performance of an obligation by the debtor (*ex contractu*);
- torts/delicts (*ex delicto*);
- performance of public functions; and
- warranty liability, that includes, *inter alia*, commercial insurance.

[2] Civil Code art. 361(2).
[3] *See* Judgment of the Sup. Ct., January 24, 2024, II CSKP 1822/22. (All cases are Poland unless otherwise identified).
[4] *See* Judgment of the Sup. Ct., November 27, 2024, I CSK 1939/23.

In accordance with the criterion of liability principle it is possible to distinguish the following regimes:

- a fault-based liability regime;
- a strict liability regime;
- an equity regime; and
- others.

There are other damages categories based on the principle of full compensation and those with partial compensation.

Irrespective of whether the liability is contractual, tortious, or warranty liability, a general group of provisions in the Civil Code together regulate liability for damages. These provisions address:

- the adequate causal link;[5]
- the extent of the compensable damage;[6]
- the contribution of the injured party to the occurrence or aggravation of the damage;[7]
- methods of compensation;[8] and
- the relevant date for the determination of the amount of compensation.[9]

Article 361(2) of the Civil Code requires an adequate causal link to determine the extent of the obligation of the person causing damage to compensate for the damage. A person is liable for the normal consequences of the act or omission from which the damage resulted. The normal consequences of the event are the consequences that this type of event will likely cause in the ordinary course of events. An abnormal consequence occurs as a result of an extraordinary coincidence that is usually not taken into account. Within the ordinary course of events, liability for damage may be caused not only by the direct cause but also by another indirect cause, unless its consequences relate to a causal relationship so weakly that their inclusion would go beyond the ordinary course of events.[10] To examine whether such a link has occurred, a two-condition test is necessary:

- the *sine qua non* test - verifies that if the obligation had been duly performed, the damage would not

[5] Civil Code art. 361(1).
[6] Civil Code art. 361(2).
[7] Civil Code art. 362.
[8] Civil Code art. 363(1).
[9] Civil Code art. 363(2).
[10] *See* Judgment of the Sup. Ct., February 9, 2024, II CSKP 1871/22.

have occurred (the given situation is examined *in concreto*); and
- the test of normality of the consequences - verifies that this type of breach objectively increases (even if only slightly) the probability of the damage.[11]

This test is intended to compensate for the damage suffered in full, but at the same time not to allow the injured party to be unjustly enriched, because damages are due only within the limits of a normal (adequate) causal link. The causal link plays a two-fold role; it determines whether a person is liable for the damage caused, and it defines the limits of this liability.

Regardless of whether the damage is material or non-material, an injured party's actions may contribute to the damage. According to Article 362 of the Civil Code, if the injured party has contributed to the occurrence or aggravation of the damage, the obligation to repair the damage shall be appropriately reduced in accordance with the circumstances, particularly the degree of fault of both parties. Determination of allocation of fault makes it necessary to consider the possibility of reduction of damages but does not prejudge it. The court decides whether - and to what extent - it is justified through the judicial assessment of compensation within the framework established by Article 362 of the Civil Code on a specific and individual basis, taking into account the circumstances of the particular case.[12]

The Polish Supreme Court has indicated that if the injured party could have mitigated its damages, such damage is not adequately linked to the injury event.[13] According to the general rule set forth in Article 6 of the Civil Code, the injured party bears the burden of proof for the existence of a causal link between the damage and the injury event.

Redress of damages may be either by natural restitution (in kind) or payment of monetary damages. In practice, despite the equivalence of these two forms of redress, in most cases matters are resolved by the payment of money. However, the choice is left to the injured party. Restitution in kind does not entirely exclude monetary compensation. For example, if, despite repair, the condition of a defective object, in terms of its technical, functional,

[11] *See* Judgment of the Sup. Ct., October 6, 2017, V CSK 20/17.

[12] *See* Judgment of the Sup. Ct., October 13, 2023, I CSK 5191/22.

[13] *See* Judgment of the Sup. Ct., July 31, 2024, I CSK 1082/23.

and aesthetic qualities, differs significantly from its original condition, the possibility of compensating the damage by awarding the injured party additional monetary compensation should be allowed in exceptional cases. Such an approach is in line with the principle of full compensation.[14]

D. Contractual Claims

According to the Polish Supreme Court, damage for breach of contract is not explicitly defined in Article 471 of the Civil Code and should be understood according to Article 361 of the Civil Code.[15] Under Article 471 of the Civil Code, "[t]he debtor shall be obliged to redress the damage arising from non-performance or from the improper performance of an obligation unless the non-performance or the improper performance is an outcome of circumstances for which the debtor is not liable." Damage results from non-performance or improper performance of a contract.

Under Article 471 of the Civil Code, the creditor bears the burden of proving the conditions for contractual liability:

- the existence of a binding obligation;
- the non-performance or improper performance of the obligation;
- the occurrence of damage of a certain amount; and
- the existence of a sufficient causal link between the non-performance or improper performance of the obligation and the damage.

The distinctive aspect of contractual liability is an obligation that existed before the prerequisites

[14] *See* Judgment of the Sup. Ct., December 3, 2024, II CSKP 555/23.

[15] *See* Judgment of the Sup. Ct., May 9 2024, II CSKP 1990/22.

for contractual liability occurred. Such an obligation may result from a legal act, whether unilateral or bilateral, but also from events to which the law associates this type of liability, such as unjust enrichment, a court decision, or an administrative act. This contractual link between debtor and creditor determines the scope of contractual liability. Article 471 of the Civil Code does not create an independent basis for contractual (*ex contractu*) liability. It must always be applied in conjunction with other provisions of the Civil Code and a given contract, which define the content of the breached obligation and the circumstances for which the debtor is liable.

While non-performance is the complete failure to perform an obligation, Polish law also recognizes damages for improper performance. Improper performance occurs when the obligation is performed incorrectly because it differs to a greater or lesser extent from the required performance. The concept of "improper performance" is very broad and ambiguous, but includes when the service has not been adequately provided because of a failure to comply with the time, place, and manner or quality. Case law of the Polish courts provides a large number of examples of compensation for improper performance:

- Article 471 of the Civil Code allows a contractor to claim damages from the land developer for non-performance or improper performance of the written development contract.[16]
- Under construction contracts, non-performance of an obligation occurs when a defect makes it impossible to perform properly, eliminates its normal use contrary to the purpose of the contract, or takes its inherent characteristics (or expressly stipulated in the contract) away, significantly reducing its value. Other defects merely prove the improper perfor-

[16] *See* Judgment of the Sup. Ct., December 9, 2010, III CZP 104/10.

mance of the obligation.[17]

- In the case of improper performance of an obligation, damage to the creditor's assets arises only if the value of those assets after the improper performance is less than the value determined assuming the contract had been properly performed. The difference is not the mere amount of the remuneration paid under the contract relating to the assets of the injured party.[18]

Contractual liability also demands the existence of a normal (adequate) causal link between the non-performance or improper performance of an obligation and damage. In this respect, the qualification of the consequences as "normal" is subject to objective assessment and does not depend on the knowledge or understanding of the debtor.[19] The debtor is liable for lack of due care, which is the same as liability based on fault, or for the acts or omissions of certain third parties (persons with the assistance of whom the debtor performs the obligation or to whom he/she entrusts the performance of the obligation and persons who are his/her legal representatives). The debtor is liable on a strict liability basis for the acts of their agents. The debtor who wishes to avoid liability must prove that the obligation's non-performance is due to circumstances for which it is not responsible. Article 471 of the Civil Code creates a rebuttable presumption that an obligation's non-performance (or improper performance) results from circumstances for which the debtor is responsible.

The Civil Code embodies the principle of full compensation.[20] Under the *ex contractu* liability regime, in general, only economic damage is compensable,[21] and in the

[17] *See* Judgment of the Ct. App.-Krakow, April 28, 2017, I ACa 1716/16.
[18] *See* Judgment of the Ct. App.-Warsaw, December 21, 2017, VI ACa 1140/16.
[19] *See* Judgment of the Sup. Ct., October 14, 2016, I CSK 104/15.
[20] Judgment of the Sup. Ct., May 11, 2023, II NSNc 64/23; Judgment of the Sup. Ct., March 17, 2023, II CSKP 730/22; Judgment of the Sup. Ct., October 28, 2022, II CSKP 456/22.
[21] The Polish legislature did not stipulate compensation for improper performance of an obligation as a result of non-economic damage, and Polish civil law does not

absence of a statutory or contractual provision to the contrary, this includes both *damnum emergens* and *lucrum cessans*.[22]

Compensation for non-economic damage is possible only if there is a provision allowing such a possibility.[23] For example, the consumer's lack of satisfaction or enjoyment in tourism contracts is not compensable as it is a violation of a personal interest, not an economic damage. This disclaimer makes applying the Civil Code to non-economic damages even more difficult, because these provisions refer precisely to personal interest damage. However, the Court of Justice of the European Union (CJEU) Judgment of March 12, 2002 provided a breakthrough in the availability of non-economic damage in contract cases: "Article 5 of Directive 90/314 on package travel, package holidays and package tours must be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday."[24]

It is also permissible for parties to contractually extend the scope of compensation to non-economic damage. In such a case, the contract should specify the types and forms of such non-economic damages and the flat-rate amounts of compensation to be paid. If the parties do not establish such contractual penalties, the calculation of contractual compensation will be based on the rules of liability for damages regulated by the Civil Code in the context of torts.

Finally, Article 471 of the Civil Code is dispositive that, under the ambit of freedom of contract, the parties may determine the consequences of non-performance, including the extent of liability for damages.[25]

E. Damages in Tort

Damage in the tort liability regime is an objectively negative impairment of the injured party's assets, consisting of the difference between the state of those assets resulting from the harmful event

provide such a juridical construction. Monetary compensation has been linked closely to the principles of tort liability, see Civil Code art. 24(1). In the case of improper performance of an obligation, the court may award compensation only in the event of a violation by the perpetrator of generally applicable mandatory rules, or - principles of social interaction. Civil Code art. 415; Judgment of the Ct. App.-Warsaw, February 17, 2017, VI ACa 1997/15.

[22] *See* Civil Code art. 361(2).

[23] Examples include tourist events and related tourist services, *see* Act of November 24, 2017, Journal of Laws of 2023, item 2211, art. 50(2).

[24] Judgment of CJEU, March 12, 2002, *Simone Leitner v TUI Deutschland GmbH & Co. KG*., C-168/00, EU:C:2002:163 (EU).

[25] *See* Judgment of the Sup. Ct., May 9, 2024, II CSKP 1990/22.

and the state that would have existed if that event had not occurred.[26] Under Article 415 of the Civil Code, "[a] person who has caused damage to another person by his own fault shall be obliged to remedy it." The Polish Supreme Court has stated that the loss of another person's property by a person using it without legal title is a form of tort, and liability for damage resulting from the commission of such an act is governed by Article 415 of the Civil Code. These are the prerequisites of tort liability:

- an unlawful causal event;
- damage to the injured party in the forms specified in Article 361(2) of the Civil Code;
- an (adequate) causal link with the causal event;[27] and
- fault of the perpetrator.[28]

Unlike contractual liability, there is no presumption of tort liability based on Article 415 of the Civil Code. In the tort liability regime, the claimant bears the burden of proof for the existence of all the prerequisites. The claimant must prove the event, the damage and its amount, and the causal link between the culpable act and the damage.[29]

Tort liability arises when an individual (entity) has committed a tortious act. Several conditions qualify a certain conduct as a civil law tort. The act in question must have been the "conduct" of the entity in question. Conduct includes both action and inaction. The conduct must be "physically" performed by the person, that is it must have been controlled by the person. Finally, the action must have been unlawful. Unlawfulness is understood broadly as an objective impropriety of conduct. Wrongdoing does not have to arise from a violation of the law, but can occur when the conduct in question contradicts the principles of social intercourse/good morals. In contrast to Article 417 of the Civil Code, under the regime of tort liability based on Article 415 of the Civil Code, unlawful behavior is both behavior contrary to the applicable legal order, which is understood as orders and prohibitions arising from legal norms, as well as orders and prohibitions arising from moral and customary norms.[30]

Another premise of tort liability is an adequate causal link between unlawful behavior and damage, as

[26] *See* Judgment of the Ct. App.-Katowice, September 29, 2021, V AGa 379/20.
[27] Civil Code art. 361(1).
[28] *See* Judgment of the Sup. Ct., June 20, 2024, II CSKP 252/23.
[29] *See* Judgment of the Ct. App.-Krakow, October 25, 2016, I ACa 799/16.
[30] *See* Judgment of the Sup. Ct., May 21, 2015, IV CSK 539/14.

set forth in Article 361(1) of the Civil Code.

Fault constitutes the fourth and final prerequisite of tort liability. The concept of fault is based on the assumption that a person has acted wrongly to the extent that one evaluate his or her behavior as negative.[31] A fault within the meaning of Article 415 of the Civil Code includes unconscious negligence, when the perpetrator, contrary to his or her duty, fails to act with due care, or fails to foresee the negative effect of his or her behavior.[32]

In this context, the question of the tort liability of a legal entity may arise. The Polish Supreme Court has stated that the act of an agent of a legal entity may form the basis for attributing tort liability to the legal person if fault can be attributed to its agent or, more precisely, to the natural entity acting on its behalf. This does not preclude the parallel liability of such natural entity. To attribute tort liability to a legal entity, the perpetrator of the wrongful act causing the damage must be a natural person acting on behalf of the legal entity.[33]

The amount of damages to be compensated is calculated using the "differential method." The object of comparison in this calculation is the actual state when the damage is determined and the hypothetical state that would have existed if the damage event had not occurred.

The Civil Code contains several provisions that apply only to tort liability:

- mitigation of damages;[34]
- joint and several liability of debtors and, when one of the debtors has already satisfied the claim in whole or in part, the right that one debtor has the right to demand compensation from the other debtors (*roszczenie regresowe*);[35]
- statute of limitations;[36] and
- redress of the damage in case of bodily harm or a health disorder.[37]

The Polish Civil Code provides for specific regulation of certain torts. These include:

[31] *See* Judgment of the Sup. Ct., January 3, 1959, 3 CR 461/58.
[32] *See* Judgment of the Sup. Ct., December 8, 1970, II CR 543/70.
[33] *See* Judgment of the Sup. Ct., May 5, 2023, II CSKP 1133/22.
[34] Civil Code art. 440.
[35] Civil Code art. 441.
[36] Civil Code art. 442(1).
[37] Civil Code arts. 444-449.

- the liability of a supervisor;[38]
- the liability of an agent;[39]
- the liability for damage caused by the ejection, spilling, or falling of any object from the premises;[40] and
- the liability for damage caused by the collapse of a structure or the detachment of its parts.[41]

A debtor's non-performance or improper performance of an obligation may also constitute a tort. In such a situation, there may be simultaneous grounds for liability for damages *ex contractu* and *ex delicto*.[42]

F. Specific Regimes of Damage Liability – Examples

1. Late performance – default

The Civil Code provides several specific regulations on liability for particular types of damages that are relevant in the civil law context. For example, the Code provides liability for late performance (default), an issue that concerns contractual liability. Polish law differentiates between delay and default. Delay is any failure by the debtor to perform an obligation in due time. Default is a delay in performing a specific factual or legal act caused by reasons attributable to the person entitled or obliged to perform that act.

Default may be categorized either as improper performance of the obligation[43] or non-performance of the obligation.[44] Under Article 478 of the Civil Code, if the object of performance is a specific item, the debtor who is in qualified default is liable for loss or damage to the object of the performance, unless the loss or the damage would have occurred even if the performance was rendered in appropriate time. However, if the consideration consists of a quantity of goods specified only according to their kind, the creditor may, in the event of the debtor's default, either purchase at the debtor's cost an equal quantity of goods of the same kind or require the debtor to pay their value, retaining, in either case, a claim for compensation for damage resulting from the default.[45]

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[38] Civil Code art. 427.
[39] Civil Code art. 429.
[40] Civil Code art. 433.
[41] Civil Code art. 434.
[42] *See* Civil Code art. 443: "A circumstance that an act or omission which the damage resulted from constituted non-performance or improper performance of a pre-existing obligation shall not exclude a claim for the remedy of the damage resulting from the delict unless something else results from the content of the pre-existing obligation."
[43] Civil Code art. 477(1).
[44] *Id.*
[45] Civil Code art. 479.

A creditor's default may also give rise to a claim against a debtor. If a creditor is in default, the debtor may claim compensation for the resulting damage. The debtor may also deposit the object of the performance in a court depository. The creditor shall be in default if, without a valid reason, he refuses to accept the service offered, refuses to perform an act without which the service cannot be performed, or declares to the debtor that he will not accept the service.[46]

2. Product liability

The Civil Code provides liability for defective products. Anyone who, within the scope of his business activity, manufactures a hazardous product is liable for damage caused to any person by the product. A product is hazardous if it does not guarantee the safety that could be expected based on normal use of the product. A product is "movable" even if it is attached to another thing, and a "product" also means animals and electricity. Factors that decide whether a product is hazardous include circumstances at the time the product is put into circulation, and especially how the product is marketed and the information provided to the consumer regarding the product's properties. A product cannot be deemed unsafe only because a similar improved product is circulated later. A manufacturer is not liable for damage caused by its product if it did not put the product into circulation or a third party put the product into circulation outside the scope of its business activity. A manufacturer is not liable if the properties of a hazardous product are revealed after the product is put into circulation unless they are due to an element inherent in the product. A manufacturer is not liable if the hazardous properties of the product could not have been foreseen based on scientific and technological conditions at the time the product was put into circulation or if its hazardous properties were required by legal regulations, as long as the hazardous product was manufactured and put into circulation within the scope of the manufacturer's business activity.[47]

3. Copyright

Article 79 of the Copyright and Related Rights Act[48] stipulates that an owner whose copyrights have been infringed may demand from the person who has violated these rights compensation for the damage caused on general terms or by

[46] Civil Code art. 486.

[47] Civil Code art. 449.

[48] Act of February 4, 1994 on copyright and related rights, Journal of Laws of the Republic of Poland 2025, item 24 as amended.

paying a sum of money equal to twice, and in the case of a culpable infringement three times, the relevant value which, at the time of claiming it, would have been due for granting the owner's consent to use the work. For example, the compensation provided for in Article 79 is due for non-contractual use of a work subject to copyright protection. Article 79 also applies to the use of another person's work without interfering with its content, including its framing by presenting a fragment, even if the author's work is cited.[49]

4. Competition law

The Act on Claims for Damages Caused by Infringement of Competition Law[50] sets out the liability for damage caused by infringement of competition law and the rules for pursuing claims for compensation for damage caused by infringement of competition law in civil proceedings. The infringer is obliged to pay compensation for the damage caused to anyone by a breach of competition law unless he is not at fault. Moreover, according to Article 7, it is presumed that a breach of competition law causes damage.

G. Contractual Penalty (Liquidated Damages)

Under Article 483(1) of the Civil Code, "[a] contract may stipulate that damage arising from non-performance or improper performance of a non-monetary obligation will be remedied by a specific sum (liquidated damages) being paid." This provision establishes that, as a rule, liquidated damages may only be stipulated for non-monetary obligations. There have been many attempts to bypass this regulation. The Polish Supreme Court recently addressed this issue, emphasizing that Article 483 of the Civil Code is a mandatory provision designed to prevent circumvention of the maximum interest rate limit set out in the Civil Code by imposing a contractual penalty on monetary obligations.[51]

In some instances, a down payment may remedy the limitations of Article 483 of the Civil Code. *De lege lata*, a function similar to that of a contractual penalty for non-performance of an obligation, may actually be performed by a down payment, which may be reserved to prevent non-performance of a monetary performance obligation and withdrawal from such a contract.[52]

[49] *See* Judgment of the Ct. App.-Warsaw, September 16, 2020, V ACa 753/19.

[50] Act of April 21, 2017 on Claims for Damages Caused by Infringement of Competition Law, Journal of Laws of the Republic of Poland, item 1132.

[51] *See* Judgment of the Sup. Ct., February 19, 2025, II NSNc 252/24.

[52] Civil Code art. 394(1).

Currently, there is a split among Polish Supreme Court decisions regarding the necessity of specifying an upper limit for contractual penalties. Some rulings emphasize that a maximum cap is required to protect parties to legal civil relationships against a "perpetual" contractual penalty.[53] Yet, two relatively recent Supreme Court resolutions indicate that specifying an upper limit is not required,[54] making this view the dominant one in judicial practice.

If a contractual penalty provision has been agreed to and a breach occurs, the creditor may choose between payment of the penalty or performance of the obligation. Without the creditor's consent, the debtor cannot discharge the obligation simply by paying the penalty.

In some instances, it is possible to mitigate the contractual penalty. Article 484(2) of the Civil Code stipulates that "[i]f the greater part of the obligation has been performed, the debtor may demand a reduction in liquidated damages; the same shall apply in the case where liquidated damages are grossly overstated." This provision should be regarded as the only way to mitigate the contractual penalty.[55] The court may reduce the contractual penalty only on a plea raised by the debtor.[56]

H. Damages Liability of Public Authorities

1. Unlawful acts and omissions

Article 77(1) of the Constitution of the Republic of Poland provides the right to claim damages from the State Treasury: "Everyone is entitled to seek compensation for damage caused by an unlawful act committed by a public authority." A public authority—the State Treasury or a regional or local authority or other legal entity which exercises the public authority power by virtue of law—is liable for damage caused by:

- unlawful acts or omissions;[57]
- the issuance of a normative act;[58]
- the issuance (or non-issuance) of a final judgment or a decision;[59] and
- the non-issuance of a normative act, if this

[53] *See* Judgment of the Sup. Ct., October 22, 2015, IV CSK 687/14.
[54] *See* Res. of the Sup. Ct., December 9, 2021, III CZP 16/21.
[55] *See* Judgment of the Sup. Ct., March 25, 2011, IV CSK 401/10.
[56] *See* Judgment of the Sup. Ct., March 23, 2006, IV CSK 89/05.
[57] Civil Code art. 417^1(1).
[58] *Id.*
[59] *Id.* at subsections (2)-(3).

kind of obligation is provided by law.[60]

The prerequisites for state liability for damages are:

- occurrence of damage;
- exercise of public authority functions;
- damage caused by the action of a public authority; and
- unlawfulness of the damage-causing action of a public authority.

The concept of "damage" should be understood in the same way as in contract or tort. The scope of compensation and the elements of damage that are subject to compensation should be determined based on the relevant provisions of the Civil Code, particularly Article 361. Thus liability relates to any damage to legally protected property, either of an economic and non-economic nature. Public authority liability for violating personal rights cannot be eliminated, even for claims for monetary compensation for non-economic damages.[61]

The "exercise of public authority" includes only actions derived from the powers laid down in the Constitution of the Republic of Poland. As a rule, the exercise of these powers is identified with the ability to regulate an individual's situation. These include all constitutional authorities — legislative, executive, and judicial.

The basic premise of liability for damage caused by an act or omission in the performance of public authority is "unlawfulness". In the public context, the Constitutional Tribunal has opted for a narrower view of the concept of unlawfulness than in the civil law context. This concept should be understood as a "breach of conduct in respect of the orders and prohibitions deriving from a legal norm."[62] The constitutional principle of state liability excludes the premise of fault.[63]

The State Treasury's liability is linked to the activities of regional or local authorities whose bodies represent the State Treasury in the event of damage (*stationes fisci*). Examples of these authorities include ministers or governmental administration (the head of the tax office, the head of the customs office, building supervision inspector). The liability in question may arise basically in any field of economic activity - where entrepreneurs, natural persons, and public administration meet and cooperate. This is particularly important for commercial entities, since, given the scope and size of their activities,

[60] *Id.* at subsection (4).
[61] *See* Judgment of the Constit. Trib., December 4, 2001, SK 18/00.
[62] *Id.*
[63] *See* Judgment of the Ct. App.-Lublin, December 29, 2023, I ACa 66/23.

wrongful actions of public authorities may lead to large-scale damage or several other negative consequences. The effect of such actions may include restriction of business operations, inability to perform contracts, loss of markets, loss of reputation, the need to reduce employment, and even bankruptcy.

2. EU Law

Because Poland is a member of the European Union, it is possible to claim damages from the State for violations of EU law and from the European Union for damages caused by EU institutions or bodies or their employees in performing their duties and as a result of their administrative or legislative activities.

Even though it is not *expressis verbis* in the Treaties, the Court of Justice of the European Union has derived its existence from the principles of loyal cooperation and effectiveness, as well as the general principles common to the legal systems of the Member States. Key rulings of the European Court of Justice (ECJ) in this regard are the judgments in cases C-6/90 and C-9/90 *Francovich and Bonifcai v Italy*[64] and Joined Cases C-46-93 *Brasserie du pêcheur SA* and C-48/93 *Factortame*,[65] in which the ECJ formulated the criteria for liability: the conferring of a specific right on an individual by EU law; the seriousness of the breach; and the existence of a causal link between the breach and the damage. These findings of the European Court of Justice made it possible for individuals to seek compensation for damage suffered before a national court based on national civil procedure. The most recent jurisprudence of the Polish Supreme Court confirms it. A Member State's liability for damages under European Union law does not depend on a prior finding of a violation of that law by a judgment of the Court of Justice of the European Union. It is up to the national court before which the action for damages is brought to decide whether there has been a violation of EU law.[66]

In the Polish legal system, the substantive basis for a claim against the State is Article 417(1) of the Civil Code, in conjunction with Article 77(1) of the Constitution of the Republic of Poland, as confirmed, by

[64] Judgment of the ECJ, November 19, 1991, joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428 (EU).

[65] Judgment of the ECJ, March 5, 1996, joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79 (EU).

[66] *See* Judgment of the Sup. Ct., April 18, 2024, II CSKP 6/22.

the resolution of the panel of seven judges of the Supreme Court.[67]

Article 268 of the Treaty on the Functioning of the European Union (TFEU) provides that the Court of Justice of the European Union has exclusive jurisdiction to rule on disputes concerning compensation for damage caused by the EU. Claims against the EU cannot be heard in the national or international courts of Member States. The second and third paragraphs of Article 340 TFEU deal with the liability of the EU for the wrongful acts (torts) of a public authority in the context of claims for damages brought against the EU. They stipulate that, according to the general principles common to the laws of the Member States, the EU must compensate for any damage caused by its institutions or its staff in performing their duties.

I. Conclusion

Liability for damages can be divided into different categories (types), directly determining the legal basis for damage claims. This article provides an overview of the issue of liability for damages under Polish law (and, in limited scope, under EU law), focusing on two key areas: breach of contract and tort. The subject is highly complex and extensive; a complete discussion of all its aspects would require a much broader analysis. A critical factor in both breach of contract or tort is the proper classification of the act, as the elements of liability *ex contractu* and *ex delicto* differ significantly. However, a debtor's non-performance or improper performance of an obligation may also constitute a tort. When seeking to hold someone liable, it is essential to provide proper evidence that demonstrates the occurrence of events that fulfill the required elements of each type of liability.

[67] *See* Judgment of the Sup. Ct., May 19, 2009, III CZP 139/08.