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The American and Polish Legal Perspectives on Cases of Neurological Perinatal Damage – Selected Issues

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Abstract: The purpose of the article is to present and analyze the method of compensation for a special type of medical damage – neurological perinatal damage – which arises in connection with childbirth and is neuropathological in nature. This damage is irreversible and the cost of medical care, which sometimes continues throughout the child's entire life, is very high. Claims involving this type of damage generate the highest compensation amounts, which means, from the liability insurance point of view, that it is a "hard-to-insure" injury. This is true for both the Polish and US liability systems, even though they are legal orders apart. What we are dealing here is, on the one hand, the need to support the family of the injured child, so that, thanks to the money obtained, they can begin their treatment and rehabilitation as soon as possible, and on the other hand, the need to take into account the interests of gynecologists and obstetricians, so that their occupations do not become deficit occupations. The idea is to increase the sense of legal security for these socially important medical professions. Given the above, attempts to seek an alternative to the judicial model of liability as a means of compensating this type of medical damage should come as no surprise. An example of an alternative liability model is the legislation enacted in two US states: Virginia and Florida (so-called "slice" no-fault liability models). These models, in effect for more than 35 years, are described in the first part of the article. In the second part, the author compares them with the main principles of the Polish judicial

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model of liability and the extrajudicial model, which, due to recent amendments to the law have undergone a major transformation. Then (due to the comprehensiveness of the subject matter), using the example of selected representative court cases, the author analyses the types of compensation claims and the amounts of benefits awarded in cases of perinatal neurological damage. The discussion ends with conclusions comparing the US and Polish models.

1. Introduction

The serious and irreversible nature of the damage to a child's health that is caused by complications and errors in perinatal care has given rise to the search for appropriate ways to compensate for this type of medical damage. Explaining the concept of neurological perinatal damage, we need to point out that, firstly, it occurs at the time of childbirth, and secondly, that it gives rise to neuropathological damage in the newborn child. The definition of this concept does not include so-called prenatal damage, i.e. damage that occurs before the child is born, during pregnancy, or even during the period before the embryo is implanted in the uterus.[1]

Perinatal neurological damage is among the most severe types of damage, and is subject to the highest amounts of compensation, especially when it comes to compensating the harm of pain and suffering of the child and immediate family members.[2] With the above in mind, and given that perinatal injury has become a "hard-to-insure" injury, so that the legal security

[1] On the broad and narrow treatment of prenatal harm, i.e., harm caused before the birth of the *nasciturus*, see: Monika Wałachowska, "Zadośćuczynienie pieniężne za krzywdę wyrządzoną w związku z leczeniem," in *System prawa medycznego*, vol. 5: *Odpowiedzialność prywatnoprawna*, ed. Ewa Bagińska (Warsaw: C.H. Beck, 2021), 841–2; Joanna Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych* (Warsaw: Wolters Kluwer business, 2010), passim.

[2] The Polish legislator introduced by the law of 24 June 2021 on amendments to the Civil Code (Journal of Laws of 2021, item 1509) an additional compensation claim for the so-called indirectly injured persons. According to Article 446^2 of the Civil Code, in the event of severe and permanent bodily injury or infliction of a disorder of health, resulting in the inability to establish or continue a family relationship, the court may award the immediate family members of the injured person an appropriate sum as monetary compensation for the harm suffered. This provision can be applied to the claims of parents in the event that their child is born with a serious neurological perinatal injury, as long as the injury results in the inability

of practicing medical professions in the field of gynecology and obstetrics has been undermined, it should come as no surprise that there is a need to find an optimal model for compensating this type of injury. Classic examples of alternative models of compensation in this regard ("slice" no-fault liability models[3]) are Florida Birth-Related Neurological Injury Compensation Act (1987)[4] and Virginia Birth-Related Neurological Injury Compensation Act (1988).[5]

As indicated in the legal literature, the legal acts mentioned above were passed in response to the failure of the insurance system to cover physicians practicing obstetrics.[6] It was pointed out that the risk of perinatal neurological damage was too high and had become a so-called "uninsurable" risk for some private insurers.[7] The source of the insurance crisis was seen in the peculiarities of the insurer-insured relationship, characterized by the asymmetry of information. It was pointed out that insurers were unable to correctly estimate the risk of an insurance accident and thus inflated premiums, which led doctors to either drop insurance or switch to self-insurance.[8] It was also noted that there was a serious drop in the number of

to establish a typical family relationship with the child. The regulation came into force on 19 September 2021. More on this in sec. 3.

3 The "slice" models include, strictly speaking, specific sources of harm. These include healthcare-associated infections, vaccinations, drug-related harms, including during clinical trials and medical experiments, and perinatal neurological harms. Compare: Ewa Bagińska, "Związek przyczynowy – wielość przyczyn," in *System prawa medycznego*, vol. 5: *Odpowiedzialność prywatnoprawna*, ed. Ewa Bagińska (Warsaw: C.H. Beck, 2021), 85–91.

4 Florida Birth-Related Neurological Injury Compensation Act (1987). 766.301–316 Florida Statutes, accessed February 8, 2024, https://law.lis.virginia.gov/vacodepopularnames/virginia-birth-related-neurological-injury-compensation-act/. In short: Florida NICA.

5 Virginia Birth-Related Neurological Injury Compensation Act (1988). Virginia Statutes §§ 38.2–5000–21, accessed February 8, 2024, https://law.lis.virginia.gov/vacodepopularnames/virginia-birth-related-neurological-injury-compensation-act/. In short: Virginia NICA.

6 Jill R. Horwitz and Troyen A. Brennan, "No Fault Compensation for Medical Injury: A Case Study," *Health Affaires* 14, no. 4 (1995): 165–6; Bagińska, "Związek przyczynowy," 89–91; Kinga Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu* (Toruń: TNOiK, 2013), 290–8.

7 George L. Priest, "The Current Insurance Crisis and Modern Tort Law," *Yale Law Journal* 96 (1987): 1523 citing a report prepared by the US Department of Justice, Report of the Tort Policy Working Group on the Causes Extent and Policy Implications of the current Crisis in Insurance Availability and Affordability 1986, passim.

8 Priest, "The Current Insurance Crisis and Modern Tort Law," 1524.

insurers interested in selling third-party liability policies, which reduced the competition in the insurance liability market.[9]

The causes of the failure of the insurance system have particularly affected maternity hospitals and privately practicing gynecologists and obstetricians. This is because perinatal damage is linked to high compensation claims due to the fact that a child affected by neurological defects needs long-term medical care, nursing care, and rehabilitation. The huge amounts of compensation for non-material damage in the form of pain and suffering were also not without significance. This made it necessary to find an alternative way to protect members of the medical staff and medical institutions from excessive financial risks in the event of liability. It should be emphasized that, unlike other types of high-risk activity,[10] the therapeutic activity of this type, which is indispensable in society, must not lead to the phenomenon of "non-electable" of designated medical professions, possibly causing doctors to leave the profession due to excessive liability risks.[11] Therefore, in the two aforementioned states, it was concluded that the implementation of a no-fault liability system for such medical damage was the only appropriate way to respond to the crisis.[12]

To account for the motives for undertaking this study, it should be pointed out that the NICA-type program[13] has existed for more than 35 years and has been generating interest in alternative systems for the compensation of such medical damage not only in the United States, but also in European countries, including civil law countries, and therefore in

9 See more on the causes of insurance crises in the US in the area medical malpractice: Małgorzata Serwach, *Ochrona ubezpieczeniowa pacjentów przed negatywnymi skutkami leczenia* (Kraków: Medycyna Praktyczna, 2018), 41–4.

10 There are distinctions between areas of so-called dangerous medical activities, i.e. activities that generate an increased risk of harm. Areas of this type of activity include, for example, health services performed with high-tech equipment, medical experiments, or invasive clinical trials. See more: Urszula Drozdowska, *Odpowiedzialność odszkodowawcza za zakażenia związane z opieką zdrowotną* (Białystok: Temida 2, 2023), 198–205.

11 Peter C. Williams, "Abandoning Medical Malpractice," *The Journal of Legal Medicine* 4, no. 5 (1984): 581.

12 See more on *no fault* systems in a collective study, ed. Dobrochna Bach-Golecka, *Compensation Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings. Comparative Law Perspective* (Cham: Springer, 2021), passim.

13 The terms NICA program or NICA plan are commonly used in U.S. literature, because this legislation was introduced into existing state legislation in the states of Florida and Virginia.

countries with different cultures and legal traditions. In the case of NICA programs, we are dealing with legislation that has been passed in response to problems that exist in other legal orders as well. Both the need to adequately compensate victims of medical injury and the desire to avoid litigation and ensure legal security in the practice of the medical professions of gynecology and obstetrics are universal values. Therefore, the presentation of the principles of state no-fault schemes in relation to perinatal neurological damage is not only likely to arouse curiosity in the Polish reader but may also provide inspiration for the Polish legislator. In recent years in Poland, in addition to the general no-fault model, two "slice" models have emerged. The first concerns compensation for post-vaccination damages,[14] while the second concerns compensation for damages resulting from clinical trials.[15] This, in turn, means that the Polish legislator has recognized the potential of such "slice" compensation schemes. This would be a particularly interesting proposal for the professional groups most likely to be affected by it: namely, gynecologists, midwives, and their liability insurance providers.

It should be emphasized that the principles of the Polish model of liability for compensation for perinatal neurological damage, are of a general nature, as they apply to all types of medical damage. This raises the question of whether the needs to support the family of the injured child on the one hand, and to ensure the legal security of doctors and midwives on the other, are taken into account at all. In order to answer this question, the author of the article first outlines the American state legal orders, and then presents the problem of choosing between the judicial and non-judicial model in the Polish legal order. Then, based on representative court cases, she analyses the circumstances of perinatal neurological injury and the compensation benefits awarded in the judicial model. Thus, the article juxtaposes the Polish judicial model with the extrajudicial one, as well as compares it to the solutions adopted in the states of Virginia and Florida.

14 Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans (Journal of Laws of 2023, item 1284, as amended), chapter 4.

15 Act of 9 March 2023 on clinical trials of medicinal products for human use (Journal of Laws of 2023, item 605, as amended), chapter 7.

2. Characteristics of Nica Programs Compared to Medical Malpractice Liability

The regulation drafted by the state of Virginia was passed after that of the state of Florida and was largely modelled on it. The two acts also have an identical axiological motivation, and can therefore be discussed together, albeit with due recognition of the differences between them.[16]

The advantage of NICA-type programs compared to the judicial route is that they do not require proving the classic prerequisites for medical malpractice liability. Tort law stipulates the need for the plaintiff to prove four main conditions of liability. Firstly, the existence of a duty of care is required; secondly, it must be demonstrated that the services of the doctor or midwife were not provided in accordance with the applicable standard of that care; thirdly, it has to be established that the relevant act or omission related to that care was the cause of the injury; and fourthly, the existence of a physically objective and ascertainable injury must be established.[17]

In the case of the NICA program, compensation cannot be claimed unless it has been established that there was a perinatal injury, i.e. an injury that occurred during childbirth or resuscitation in the immediate postpartum period. The injury should be the result of a mechanical injury (e.g., brain or spinal cord injury) or of fetal hypoxia during delivery. As a result of perinatal damage, there should be permanent physical and mental impairment. Therefore, it can be assumed that the severity of the injury is the main determinant of participation in the program. Those included in it are mostly children affected by severe cerebral palsy. Those suffering from genetic defects or congenital defects are excluded.[18] In Florida, injuries related to the birth of a live newborn weighing less than 2.500 grams (for a single pregnancy) and less than 2000 grams (for multiple pregnancies) are

16 Compare: Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu*, 290–1.

17 Horwitz and Brennan, "No Fault Compensation for Medical Injury," 167.

18 The origin of neurological perinatal injury is the most common cause of litigation, see, for example, the case Virginia Birth-Related Neurological Injury Compensation Programme v. Logan, Court of Appeals of Virginia, 10 June 2006, accessed February 9, 2024, https://law.justia.com/cases/virginia/court-of-appeals-unpublished/2006/1407054.html. The case concerned the etiology of childhood cerebral palsy (congenital or perinatal), which the child suffered from.

also excluded.[19] In Virginia, neurological injury at birth should also result in the child being assisted in all major life matters. Thus, we are dealing with the characteristic features of no-fault liability that distinguish it from medical malpractice liability.

The first of these features is that, compared to classic civil liability, the event to which liability is linked is defined differently. Notable is not only the fact that it is not necessary to prove fault, but also a specific construction, describing the circumstances that cause and exclude liability. Under the program, there is no need to identify the responsible doctor (possibly midwife) or their insurer since compensation is awarded from a special Fund. The parties to the proceedings are the child's representative as the applicant and the NICA Association. Secondly, the financial basis of the liability system is a special fund from which compensation is paid. This fund is financed by contributions from doctors, obstetricians, and hospitals. In addition, the funds collected are invested.[20] Participation in the programs is voluntary. However, it is worth noting that in the case of gynecologists and obstetricians, they must pay contributions (annual assessment) to be covered by the program. This is tied to obtaining a license to practice in the state.[21] The state of Virginia additionally provides for qualification procedures, evaluating the candidate in terms of his or her past professional practice and the frequency of complications associated with the practice. Namely, the Medical Commission examines past practice from the point of view of compliance with established standards of practice for a given medical specialty. It evaluates and qualifies the candidate in terms of the risks posed by his or her participation in the program. Maternity hospitals, on the other hand, are required to agree to periodic inspections by the state

19 This type of restriction is not provided for by the Virginia NICA program.

20 The problem was the classification of this fund as either private or public. Since the fund was initially endowed by state funds (in the case of Florida, to the tune of USD 20,000,000), in the litigation between NICA and MEDICAID (a public fund), NICA tried to prove that "the program is an 'arm' of the state and, as a result, is entitled to immunity." Consequently, as a "payer of last resort" NICA may not have paid for services performed by MEDICAID to program participants. This reasoning, however, has not been found adequate by the courts, including the Florida State Court of Appeals (compare: The 11th U.S. Circuit Court of Appeals ruling of 20 July 2022) More on this case further below.

21 See: information contained in NICA programs on the official websites NICA of Florida and NICA of Virginia, respectively, accessed February 9, 2024, http://www.nica.com/.

health department.[22] Thirdly, economic damage (expenses for treatment, care, transportation, rehabilitation, medical apparatus, and equipment) is primarily compensated, while non-material damage is subject to lump-sum compensation, only up to a certain amount.[23]

Since doctors covered by the NICA program will not be held civilly liable if the parents of the injured children choose the NICA system (the exclusive feature of the no-fault system[24]), both states have decided on the possibility of imposing sanctions on the doctor whose activity is linked to the compensation. A determination by the Industry Commission (in Virginia) or the Division of Administration Hearings (in Florida)[25] made under the NICA compensation procedure is forwarded to the Division of Medical Quality Assurance of the Department of Business and Professional Regulation (a division of the Department of Health). It evaluates whether standards of medical care have been violated. If violations are found, the Division can fine the doctor and even revoke his or her license to practice.[26] Despite initial objections on the grounds that this solution is too far-reaching, it was pointed out that this solution has been considered a necessary element of the program, due to the fact that doctors are not individually liable for the injury caused. Noticeable here is the attention paid to other than compensatory functions of liability for damages, it is mainly about the impact of disciplinary and preventive functions.[27] It is worth noting at this point that both authorities hearing the application rely on the opinions of experts while making their decisions. In the state of Florida, the judge uses the opinion of the Neurological Injury Compensation Programme

22 Ibid.

23 The Virginia NICA program does not provide classic compensation for non-pecuniary loss. The Florida NICA program, on the other hand, pays specified lump sums. Up to USD 250,000 is paid to directly injured persons, while up to USD 50,000 is paid to indirectly injured persons in the event of a child's death.

24 The exception is the infliction of damage through intentional fault.

25 It is noteworthy that in both states, extrajudicial bodies already in place were used, and no new bodies were created to hear the case of covering compensation for perinatal neurological injury. In Virginia, the application is handled by the commissions set up for employment injury compensation, while in Florida it is the Division of Administration Hearings, the body set up to resolve disputes over benefits, services, and actions administered by the Cabinet for Health and Family Services.

26 Horwitz and Brennan, "No Fault Compensation for Medical Injury," 169.

27 Ibid., 231.

Association, consisting of doctors and lawyers. In the state of Virginia, a three-member college of physicians appointed by the Industry Commission determines the merits of the application.

The NICA program is optional. A parent of a child born with neurological perinatal damage has the right to choose between a judicial or non-judicial route. However, if a claim is referred to NICA, the parent, as the child's legal representative, loses the opportunity to pursue a claim through the courts. At the same time, a ruling under the NICA procedure can be appealed to the District Court of Appeal for the state of Florida or Virginia, respectively, and then to the state Supreme Court (only in Virginia). This, in turn, means that there is a substantive review of the issued decision. As noted, the choice of either the NICA programme or the traditional court route is largely determined by the amount of possible compensation. If the prerequisites for medical malpractice liability are met, the choice of traditional litigation is regarded as the more favorable alternative, given the possibility of seeking redress (in the case of Virginia NICA) or obtaining a higher amount (in the case of Florida NICA). However, when the issue of medical malpractice liability is in doubt and the injury is serious, the NICA programme becomes an attractive option. The issue of providing ongoing medical care and adequate rehabilitation can thus tip the scales in the process of deciding on the choice of a claim route. However, this advantage of the program has recently been called into question following the *Cody case*.[28]

To clarify the above matter, we need to point out that, according to relevant state regulations, care for children with disabilities can be financed from various sources.[29] Thus, patients covered by NICA-type programs may simultaneously be beneficiaries of other programs, such as the MEDICAID social program.[30] As a result, the ongoing medical costs are *de facto*

[28] The case: Arven v. The Virginia Birth-Related Neurological Injury Compensation Program (1:15-cv-00870). District Court of Virginia of 26 September 2018.

[29] The US has both private and public health insurance programs, the most popular being MEDICARE, MEDICAID, or the SCHOOL CHILDREN HEALTH INSURANCE PLAN (SCHIP) program, which regulates insurance for school-aged children. It wasn't until 2010 that a federal universal health insurance plan began to be implemented, which took the name: Patient Protection and Affordable Care Act (PRACA), L. No. 11–148, 124 Stat. 119 (2010).

[30] MEDICAID is a joint federal-state healthcare program that provides coverage and benefits to low-income and disabled individuals. Under federal law, MEDICAID is generally the payer of last resort.

covered by another fund. The problem arose when the MEDICAID program questioned the financial coverage of medical procedures performed on a patient named Cody, which resulted in a dispute between the designated funds. The case ended up in federal court in the state of Virginia as a result of a lawsuit brought by Veronica and Theodore Arven; the parents of disabled Cody, acting as the so-called whistle-blowers.[31] The basic allegation was that NICA illegally passed on the cost of medical treatment for Mr. and Mrs. Arven's son to other taxpayers who were contributing to the MEDICAID social and medical assistance fund. The court, in agreeing with the parents, also considered the question of how the NICA program is supposed to secure the future care of its wards, and whether it should therefore reimburse MEDICAID for costs incurred to date. In 2018, the parties reached a settlement under which Virginia NICA paid USD 20,700,000 to MEDICAID in medical reimbursement and agreed to stop passing along such costs in the future. The plaintiffs received more than USD 4 million of the total agreed amount of USD 20,700,000 as the initiators of these proceedings.[32] On April 25,2019, Veronica Arven filed a similar claim in Florida Federal Court. As a result of the conclusion of this case (also by agreement), Veronica Arven received USD 12,750.000 as her share of the recovery of the total amount of USD 51,000,000[33] agreed upon in this case.

3. General Characteristics of the Polish System of Compensation for Medical Damage: The Problem of Choosing between the Judicial and Non-judicial Models

The basic premise for bringing a civil action or initiating proceedings under the alternative compensation[34] system is the need to verify whether the

[31] The whistle-blowers have standing to sue under the False Claims Act because of the possible depletion of federal funds for and on whose behalf they are suing. They receive a certain percentage of the winnings.

[32] Daniel Chang and Carol M. Miller, "Florida Protected OB-GYNS from Paying for Their Mistakes. The Handed Taxpayers the Tab," accessed February 1, 2024, https://www.miamiherald.com/news/politics-government/state-politics/article251785778.html.

[33] The case: United States ex rel. Arven v. The Florida Birth-Related Neurological Injury Compensation Ass'n, et al., Case No. 19-cv-61053-WPD (S.D. Fla.) District Court of Florida of 14 November 2022.

[34] In Polish law, an alternative system of compensation was established by the Act of 28 April 2011 amending the Act on Patients' Rights and Patients' Ombudsman and other acts, Journal

harm suffered by the child during childbirth was the result of conduct contrary to current medical knowledge (in the non-judicial model) or negligence on the part of the medical personnel (in the judicial model).[35] This is because the main premise of the non-judicial model is the assumption of liability for conduct contrary to current medical knowledge, whereas, in the judicial model, a gynecologist or obstetrician is liable when fault can be attributed to them (even if a medical institution is responsible[36]).

It is the sense of responsibility for the future of a person who will require long-term care, medical assistance, and rehabilitation that supports the search for causes of involuntary suffering.[37] Other reasons for medical disputes, such as higher patient awareness, high risk of harm due to inadequacies in the health care organization system, mercantilism in the practice of both the medical and legal professions, as well as the fomenting of conflicts or unreliable patient expectations by the media,[38] appear to be secondary causes in the case of this type of medical damage. Given the emergence of a serious medical injury, resulting in high costs of care with a concomitant lack of sufficient material resources for this care, it becomes quite obvious why the parents of the injured children decide to initiate proceedings.

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of Laws, No. 113, item 660. Until 30 June 2024, the proceedings were held before the Provincial Commission for Adjudication of Medical Events. Currently, the body considering the dispute regarding the occurrence of a so-called medical event is the Patients' Ombudsman.

35 As it is pointed out, the difference between these premises is not significant due to the highly objectified criteria for examining guilt in court proceedings, for more information see: Urszula Drozdowska, "Spory medyczne przed komisjami ds. zdarzeń medycznych," in *Spory medyczne*, ed. Agata Wnukiewicz-Kozłowska (Wrocław: E-publishing, Legal and Economic Digital Library, Faculty of Law, Administration and Economics, University of Wrocław, 2021), 82–90.

36 Compare Polish Civil Code, Article 430, according to which a superior is liable for a subordinate on a strict liability basis but taking into account the subordinate's fault.

37 Compare: Beata Janiszewska, "Specyfika sporów medycznych w procesie cywilnym," in *Spory medyczne*, ed. Agata Wnukiewicz-Kozłowska (Wrocław: E-publishing, Legal and Economic Digital Library, Faculty of Law, Administration and Economics, University of Wrocław, 2021), 47.

38 Agata Wnukiewicz-Kozłowska, "Wprowadzenie do problematyki sporów medycznych," in *Spory medyczne*, ed. Agata Wnukiewicz-Kozłowska (Wrocław: E-publishing, Legal and Economic Digital Library, Faculty of Law, Administration and Economics, University of Wrocław, 2021), 9–17.

In this context, therefore, it is worth noting that in the Polish judicial model, there is not only a legal assessment of the harmful event, which is binding on the parties but also, if the case is won, there is the possibility of obtaining an enforcement title authorizing effective enforcement of the awarded benefits. In the out-of-court model, in the proceedings before the Provincial Commission for Adjudication of Medical Events (hereinafter referred to as the Commission), it was determined whether a given harmful event was a medical event within the meaning of Article 67a(1) of the Act on Patients' Rights and Patients' Ombudsman.[39] Accordingly, the Commission did not award compensation benefits. Once the ruling on the determination of the existence of a medical event became final, the compensation offer was to be made by the insurer of the medical event,[40] or in the absence of insurance, by the hospital.[41]

This two-tier model of proceedings proved to be the main shortcoming of the alternative system. In practice, the offers made by hospitals tended to involve severely underestimated amounts.[42] As a result, patients reject-

[39] A medical event was the infection of a patient with a biological pathogen, bodily injury or disorder of health, or death, resulting from procedures inconsistent with current medical knowledge: in terms of diagnosis, if it caused improper treatment or delayed proper treatment, contributing to the development of the disease (1), in terms of treatment, including the performance of surgery (2), in terms of the use of a medicinal product or medical device (3). This provision, as well as the entire procedure, was repealed by the Law of 16 June 2023, Journal of Laws, item 1675. For more information see: Leszek Bosek, "Commentary to Articles 67a et seq. Law on Patients' Rights and Patients' Ombudsman," in *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz* [*Act on Patient's Rights and Patient's Rights Ombudsman. Commentary*], ed. Leszek Bosek (Warsaw: C.H. Beck 2020), 725–38.

[40] The insurance was conceived as first-party insurance. Because insurers significantly inflated premiums, hospitals found it difficult to purchase insurance policies. As a result of pressure from hospitals, compulsory insurance became optional insurance. See more: Serwach, *Ochrona ubezpieczeniowa pacjentów przed negatywnymi skutkami leczenia*, 304–5.

[41] This model applied only to medical events that took place in the hospital. Recently, there has been a further narrowing of the subject matter of the proceedings. Proceedings before the Patients' Ombudsman apply to hospitals that provide so-called guaranteed health services, i.e., services under contract with the National Health Fund (NHF), the public body established to organize and finance health services under the universal health insurance system. Hospitals that provide services commercially have therefore been excluded from the out-of-court system.

[42] There have been absurd situations, such as offers in the amount of one zloty. This occurred when the treatment entity did not agree with the committee's ruling at all.

ed these offers,[43] and took their claims to courts. The Commission model began to be regarded as a kind of "pre-judgement" or "evidence hunting"[44] because the proceedings before the Commission enabled patients to prepare for a confrontation in court at a relatively low cost.[45] Admittedly, the court was not bound by the findings of the Commission, however, thanks to the proceedings before the Commission, the party initiating the litigation had at its disposal, the opinions of experts, the testimony of witnesses, and the reasoning behind why the Commission accepted the incompatibility of a given procedure with current medical knowledge. Thus, the assumed rule that the model would not apply to cases of serious medical damage (including cases of serious perinatal neurological damage) proved true only in part. Cases of serious medical damage have also been the subject of Commission proceedings due to the uncertainty regarding the outcome of litigation inherent in medical cases.

Following the creation of a public compensation fund for victims of medical events, the Polish out-of-court model has been transformed. First, the definition of a medical event has been amended, indicating that it can be any event (in the form of infection, bodily injury, disorder of health, or death) as long as it could have been avoided with a high probability if the health service had been provided in accordance with current medical knowledge or if another available diagnostic or treatment method had been used, unless there were foreseeable normal consequences of the method to which the patient gave informed consent. Second, proceedings before the Patients' Ombudsman end with an administrative decision establishing the existence of a medical event and either awarding a certain lump sum

43 Serwach, *Ochrona ubezpieczeniowa pacjentów, przed negatywnymi skutkami leczenia*, 340.

44 Kinga Bączyk-Rozwadowska, "Koncepcja *no fault compensation* a polski system kompensacji szkód, doznanych w następstwie zdarzeń medycznych," in *Współczesne problemy prawa zobowiązań*, ed. Adam Olejniczak et al. (Warsaw: Wolters Kluwer, 2015), 91.

45 The application fee was fixed and amounted to only PLN 200. The cost of expert opinions was also low. The Decree of the Minister of Health of 23 December 2011 on the lump sum of costs in the proceedings before the Provincial Commission for the Adjudication of Medical Events (Journal of Laws No. 294, item 1740) set the rate for the issue of an opinion at PLN 300. It was subject to an increase of PLN 150 if the opinion was prepared by a person with the academic title of professor, PLN 100 – with the title of associate professor, PLN 60 – with the degree of doctor. These amounts made it impossible to find an expert willing to write an opinion.

as compensation or denying compensation.[46] Thus, the idea of alternative proceedings has changed diametrically.[47] Proceedings before the Patients' Ombudsman take on an administrative-legal character. At the same time, compensation is paid by a public fund, which is financed primarily with deductions from universal health insurance premiums.[48] As a result, neither hospitals (which are primarily public hospitals) nor their insurers bear any financial burden, both before the medical event (e.g., in the form of a premium) and after it has occurred.[49]

As with a civil court judgment, the decision is enforceable. However, the difference between proceedings ending in a civil court judgment and proceedings before the Ombudsman ending in an administrative decision is that, as in Commission proceedings, the patient may not accept the proposal contained in the decision of the Patients' Ombudsman,[50] considering it unsatisfactory.[51] The danger of treating the proceedings before the Patients' Ombudsman as a kind of "pre-judgment" arises here as well, especially in the case of serious medical damage, such as perinatal neurological damage. As it seems, pre-determining whether a case can end in a win is still a tempting prospect for medical lawyers and their clients. Hence the need for a brief overview of the new course of proceedings.

The proceedings are initiated by an application to the Ombudsman (subject to a fixed fee of PLN 300). The first requirement of alternative proceedings regarding low cost and thus accessibility has been met. In the case of perinatal neurological damage, the application may be filed by one of the

46 Cf. Article 67za of the Act on Patients' Rights and Patients' Ombudsman.

47 This issue clearly demonstrates the interpenetration of private law and public law norms in medical law. For the definition of medical law see: Zbigniew Banaszczyk, "Properties and Elements of a Private Medical Law Relation – General and Methodological Premises," in *Medical Law*, ed. Leszek Bosek (Warsaw: C.H. Beck, 2019), Legalis.

48 Cf. Article 67zi (3) of the Act on Patients' Rights and Patients' Ombudsman.

49 As it seems, this circulation of "public money" explains why only hospitals with contracts with the National Health Service (NHS) are beneficiaries of this arrangement.

50 With the acceptance of the offer, the applicant (the patient, the legal representative of a minor patient, or a close relative, in the event of death) waives legal redress. Cf. Article 67zc of the Act on Patients' Rights and Patients' Ombudsman.

51 The amounts are as follows: for infection with a biological pathogenic agent or bodily injury or health disorder from PLN 2,000 to PLN 200,000. In the event of a patient's death, compensation to relatives ranges from PLN 20,000 to PLN 100,000.

parents acting as the child's legal representative.[52] The application shall be accompanied by a copy of the medical records in the applicant's possession and other documents confirming the described facts, or detailed information if such documents are not available.[53]

The child's legal representative makes three statements. The first is a declaration that no civil proceedings for compensation, pension or damages are pending or have not been finally concluded in the case covered by the application. The second is a declaration that the criminal court has not ordered reparation for the harm caused by the crime or for the harm suffered, or for restitution to be made to the child. The third is that the child has not obtained compensation, pension, or reparation from the person responsible for the damage, including the liability insurance provider. The latter statement prevents obtaining compensation benefits from the responsible party and from the public compensation fund at the same time. The first and second statements preclude simultaneous conducting of judicial and extrajudicial proceedings. In addition, for the duration of the proceedings before the Ombudsman, the course of the statute of limitations for claims for compensation for damage resulting from the medical event to which the application relates does not begin, and the one that has begun is suspended.[54] This provision suggests that there is no obstacle to initiating civil proceedings after proceedings before the Ombudsman, especially if the Ombudsman issues a decision proclaiming the absence of a medical event. In turn, in the event of a decision favorable for the applicant, another important issue arises; namely, the possibility for a civil court to use the expert opinion that formed the basis of the Ombudsman's decision. Of course, this possibility will arise only if the legal representative, in response to the decision awarding the benefit, does not accept the proposed benefit

52 Cf. Article 67t (2) in conjunction with Article 67u of the Act on Patients' Rights and Patients' Ombudsman.

53 According to Article 67y of the Act on Patients' Rights and Patients' Ombudsman, the Ombudsman is the controller of the data contained in the documentation in connection with the proceedings. The Medical Incident Compensation Fund Benefits Team, established at the Ombudsman, is authorized to process the records (including electronic records) to the extent necessary for the preparation of an opinion.

54 Cf. Article 67w (2) of the Act on Patients' Rights and Patients' Ombudsman.

on behalf of the minor patient.[55] In that case, he does not have to make a statement waiving all claims for compensation, pensions, and damages that may arise from the medical event (Article 67zc of the Act on Patients' Rights and Patients' Ombudsman).[56]

At this point, it should be noted that under Article 278[1] of the Polish Code of Civil Procedure,[57] a civil court may admit evidence of an opinion prepared at the request of a public authority in other proceedings provided for by the law. The main purpose of such a solution is to reduce the likelihood of duplication of activities of experts, who often prepare several opinions on the same case. In this context, it is worth highlighting the following points.

Firstly, the Patients' Ombudsman, according to Polish law, is an organ of central government administration (Article 42 (1) of the Act on Patients' Rights and Patients' Ombudsman), which means that it meets the requirement of being a public authority. As has been pointed out, the Ombudsman does not conform to the classic model of an ombudsman independent of the executive branch.[58] The powers conferred on him by the legislature

55 Pursuant to Article 67 zc (1) of the Act on Patients' Rights and Patients' Ombudsman, the applicant shall submit to the Ombudsman a statement of acceptance of the compensation benefit or renunciation of the compensation benefit within 30 days from the date the decision becomes final.

56 This raises issues that cannot be elaborated on within the scope of a short article. First, whether the parents' statement of abandonment of the claim (without the consent of the guardianship court) is legally effective, and second, whether, given the developmental nature of perinatal neurological damage, the statement is affected by the lack of awareness on the part of the parents. It should also be emphasized that the declaration of waiver of claims can only apply to damage disclosed up to the date of the application. Therefore, the amount awarded could be considered to compensate for damage only to the basic needs of the child. This type of interpretation is supported by the very short deadlines for filing a claim (1 year counted from the date of the damage becoming apparent, 3 years counted from the date of the event). Taking into account the fact that parents find out about their child's serious neurological defects quite quickly (usually within a few days after childbirth), the dates of the two deadlines coincide (cf. Article 67t (3) of the Act on Patients' Rights and Patients' Ombudsman). This, in turn, means that the court route would be permissible to the extent of damages that became apparent after the date of filing the application.

57 Act of 17 November 1964 – Polish Code of Civil Procedure, Journal of Laws of 2023, item 1550, as amended. In short: Pol. Civ. Proc. Code.

58 For more information on the legal status of the Patients' Ombudsman, see: Leszek Bosek, "Opinia o projekcie ustawy o ochronie indywidualnych i zbiorowych praw pacjenta oraz o Rzeczniku Praw Pacjenta," in *Zmiany w systemie ochrony zdrowia w procesie*

are of a mixed nature, i.e. they are characteristic of ombudsman's powers, as well as those of the executive branch (e.g., in terms of imposing fines on medical institutions in the event of violations of the collective rights of patients[59]). Secondly, the Ombudsman conducts proceedings to determine a medical event under the law. Thirdly, the provision of Article 278[1] of the Polish Code of Civil Procedure does not use, with reference to a document prepared in other proceedings, the concept of an "expert opinion," but speaks only of an "opinion." Therefore, it can be assumed that the opinion of the Medical Event Compensation Fund Benefits Team,[60] composed of specialists in medical science on the occurrence of a medical event and its consequences, meets the requirements of the provision under review.[61]

It should be noted that the application of Article 278[1] of the Polish Code of Civil Procedure would lead to a significant shortening of civil proceedings. The positive impact of this provision has another dimension too. It undoubtedly provides an additional incentive to initiate proceedings before the Ombudsman for the sole purpose of "probing" whether an action before the court is likely to succeed.

Proceedings before the Ombudsman are proceedings that are expected to be completed within a relatively short time. According to Article 67za (3) of the Act on Patients' Rights and Patients' Ombudsman, a decision is issued within 3 months of receiving a complete and properly paid application. In doing so, the Ombudsman relies on the opinion of the Team, which in turn has 2 months to prepare it. Thus, the requirement for speed of alternative proceedings is fulfilled. The procedure before the Ombudsman does not provide for hearings involving parties or witnesses. The provision of Article 67z of the Act on Patients' Rights and Patients' Ombudsman only allows the applicant to be summoned to provide information, explanations, and documents necessary for the consideration of the case. Similarly, the

legislacyjnym (283), Przed pierszym czytaniem, no. 4 (2008): 21; Urszula Drozdowska and Marcin Śliwka, "Analiza statusu prawnego Rzecznika Praw Pacjenta – zagadnienia wybrane," *Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu* 47, no. 3 (2015): 9–34.

59 Article 68 et seq. of the Act on Patients' Rights and Patients' Ombudsman.

60 The Team consists of at least 20 members practicing in the medical profession, including at least 15 members practicing in the medical profession. The opinion is given in the composition, not more than 3 members.

61 Cf. Article 67x of the Act on Patients' Rights and Patients' Ombudsman.

Ombudsman may request information, explanations, and documents from the health care provider that are in the applicant's possession. The proceedings are therefore conducted in writing and do not confront the patient and the health care provider with each other, which is currently considered debatable in the context of alternative proceedings.[62]

The compensation benefit is paid within 14 days from the date of submission of the statement of acceptance of the compensation benefit. The healthcare provider to whose activities the application is related is informed of the Ombudsman's positive decision (on the determination of the medical event and payment of the compensation benefit). As a result, it is obliged to analyze the root causes of the medical event and formulate and implement recommendations to take measures to improve the quality and safety of the health care services provided in order to prevent a recurrence of the medical event, unless an analysis has already been carried out in this regard (Article 67zd of the Act on Patients' Rights and Patients' Ombudsman).

Only the applicant is entitled to file an appeal.[63] Since the payment is awarded from the compensation fund, it was considered that the hospital is not a party to the proceedings and has no right to appeal the decision on the occurrence of a medical event. This approach may be questionable, if only because the procedure can be treated by the claimant as a kind of "pre-judgment" and used in a later claim.

4. Analysis of Litigation for Compensation for Neurological Perinatal Injury

Given the severity of the neurological perinatal injury, the petitioner's choice of the judicial model seems to have been a foregone conclusion anyway. Even if the proceedings before the Ombudsman end with a positive decision on the occurrence of the medical event and the compensation offer is made, the highest possible amount of compensation of PLN 200,000 cannot meet the needs of the child affected by neurological perinatal injury. As a result,

62 Drozdowska, *Odpowiedzialność odszkodowawcza za zakażenia związane z opieką zdrowotną*, 501–2.

63 The appeal is filed with the Appeals Board for Medical Event Compensation Fund Benefits. Cf. Article 67ze et seq. of the Act on Patients' Rights and Patients' Ombudsman.

the parents are unlikely to accept the offer and will likely take the case to a court of law.

Two distinctive court of appeal rulings, made relatively recently (in 2021 and 2022), will be presented below. These cases illustrate the range of compensation claims and give us an idea of the benefits being awarded. They also indicate the prerequisites for liability for damages, which are the building blocks of liability.

The tort victim who is in a state of harm due to severe perinatal neurological injury is entitled, as any person suffering an injury in the form of bodily injury and disorder of health, to monetary compensation under Article 445 of the Polish Civil Code.[64] However, such persons are not able to use the compensation received. The compensation awarded to an impaired person under Article 445 of the Polish Civil Code, therefore, in essence, benefits those who provide care to that person. Perhaps this circumstance meant that for a long time, in Poland, there was no basis for awarding compensation to anyone other than the injured person.

The system of compensation for medical damage currently in force in Poland[65] includes, in addition to the above-mentioned compensation for the impairment of health and injury to the body of the directly injured person (Article 445 §1 of the Polish Civil Code), compensation to relatives for the death of the injured person (Article 446 §4 of the Polish Civil Code) and the above-mentioned compensation to the immediate family member of a person with whom a family relationship cannot be established

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64 Act of 23 April 1964 (Journal of Laws of 1964, No. 210, item 2135, as amended). In short: Pol. Civ. Code.

65 Despite the absence of a statutory basis, some common courts and even the Supreme Court (compare: judgment of the Supreme Court of 27 March 2018 (ref. III CZP 60/17)) have awarded compensation to immediate family members for the loss of family ties. This was made possible by the approach recognizing the family bond as a personal good, subject to protection under Article 448 of the Pol. Civ. Code. However, this concept was challenged in the Supreme Court's judgment of 22 October 2019 (ref. I NSNZP 2/19), which gave rise to Article 446^2 of the Pol. Civ. Code. Similarly, a violation of a patient's rights gives rise to the possibility of awarding damages under Article 448 of the Pol. Civ. Code (compare: Article 4(1) of the Act of 6 November 2008 on Patients' Rights and Patients' Ombudsman, Journal of Laws of 2009, No. 52, item 217, as amended). The issue of violation of the patient's right to health services corresponding to the requirements of medical knowledge (in the case of errors in the conduct of childbirth) remains, due to its extensiveness, beyond the scope of consideration.

or continued as a result of the tort (Article 446² of the Polish Civil Code). The latter regulation entered into force on 19 September 2021.[66]

As a result, in cases involving compensation for severe perinatal neurological damage, we have to deal with the so-called "multiplicity", i.e. multiple claims raised by the plaintiff.[67] In addition to claims for compensation for the harm, property claims are made for medical, care, and rehabilitation expenses incurred (Article 444 §1 of the Polish Civil Code),[68] as well as a claim for payment of compensatory pension (Article 444 §2 of the Polish Civil Code).[69]

Another characteristic feature of the medical lawsuits in question is the high value of the claims that are raised and subsequently awarded.[70] The claim for compensation in favor of the directly injured person is usually the highest.[71] In comparison, the claim for compensation in favor of the child's parents or siblings as indirectly injured persons is significantly lower. By way of example, in the justification of the judgment of Courts of Appeal in

66 Based on Article 2 of the Law of 24 June 2021 on amendments to the Civil Code, the new provision applies to torts that occurred also before 19 September 2021 (retroactive nature of the provision).

67 The plaintiffs will be, in addition to the minor child (represented by the parents), the parents, and even siblings as the closest relatives of the injured party. Both the feature of "multi-claims" mentioned in the main text and the multi-subjectivity are characteristic of medical trials; Janiszewska, "Specyfika sporów medycznych w procesie cywilnym," 47–54.

68 According to Article 444 §1 of the Pol. Civ. Code, in the event of physical injury or impairment of health, compensation for damage shall cover all resulting costs. At the request of the victim, the indemnitor should pay in advance the sum needed for the cost of medical treatment, and if the victim has become an invalid, also the sum needed for the costs of training for another profession.

69 According to Article 444 §2 of the Pol. Civ. Code, if the injured party has completely or partially lost his or her earning capacity, or if his or her needs have increased or his or her future prospects have diminished, he or she may demand an appropriate pension from the indemnitor.

70 The plaintiffs demanded PLN 1,000,000 in compensation for the directly injured party, and PLN 200,000 for each of the parents and brother of the directly injured party (a total of PLN 600,000). In addition, they claimed damages in the amount of PLN 7,591.99 and annuities in various amounts for the periods prior to the lawsuit, including for the future. Separately, claims for interest on account of delay were raised, and a request was made to establish liability for the future.

71 With the proviso that, at the request of the injured party, a lump sum of one-time compensation may be paid in advance as an annuity. In such a case, this amount may exceed the amount of the compensation. Cf. Article 444 § 3 of the Pol. Civ. Code.

Warsaw of 19 May 2022,[72] we read that the compensation for the directly injured plaintiff amounted to PLN 1,000,000, while the compensation for his next of kin (parents) amounted to PLN 200,000 for each of them.[73]

The facts of the case show that the plaintiff was born with severe cerebral palsy as a result of an acute central nervous system hypoxia occurring during delivery as a result of the umbilical cord being wrapped around the baby's neck. The medical institution responsible for the treatment was accused of a significant delay in restoring the baby's circulation and gas exchange, as well as of stopping replacement ventilation and extubating too early, without ascertaining the state of circulation and the quality of gas exchange. The experts pointed out unequivocally that the CTG records dictated that a cesarean section be performed quickly, which was not done. In doing so, they ruled out the possibility of harm from intrauterine septic shock. As a result of the negligence described above, the child suffers from quadriparesis, symptomatic epilepsy, lower limb seizures, myoclonic seizures, and balance and motor coordination disorders. The child is also incapable of verbal communication, lacks manual dexterity, and is in severe pain. The child also experiences so-called muscle tearing while falling asleep and during sleep, which means that, when asleep, the child has to be accompanied by the mother, who cannot sleep through the night for this reason.

Since the Court of Appeal in Warsaw was ruling after the entry into force of Article 446^2 of the Polish Civil Code, this Court took up the key considerations for the interpretation of this provision regarding the necessity of determining whether the state of the child's health allows for establishing typical family ties with those closest to him or her, or for the continuation of such ties. In the court's view, this requires the examination of the child's state of consciousness, in accordance with the rules of evidence, to

72 Ref: V ACa 34/21, Legalis.

73 These are the amounts resulting from the judgment of the Warsaw District Court (ref. II C 277/13). The first instance judgment was made before the amended provision of Article 446^2 of the Pol. Civ. Code came into effect. Accordingly, PLN 200,000 was awarded to each of the parents for the violation of family ties based on the content of Article 448 of the Pol. Civ. Code. The brother of the directly injured party received PLN 180,000. The Court of Appeal in Warsaw, as a court of second instance, referred the case for reconsideration in this regard, indicating that the court of first instance was to reconsider the prerequisites for compensation set forth in Article 446^2 of Pol. Civ. Code. This was possible due to the retroactive nature of this provision, since the injurious event (childbirth) took place on 22 August 2010.

determine whether consciousness can arise in the injured person allowing the person to establish such bonds with relatives. Therefore, in this regard, the Court of Appeal in Warsaw referred the case back to the lower court as a court *meriti*.[74]

Although in the Polish legal system, the system of universal health insurance finances ongoing health care for children up to the age of 18,[75] as is clear from the wording of the justification of the Court of Appeal in Warsaw, the incurred, as well as future costs of care and rehabilitation of the minor turned out to be only partially covered by the National Health Fund and other charitable organizations, which are not legally obliged to cover them. The amount of the pension, therefore, covered the costs associated with the use of appropriate medical equipment (in the injured person's home) and professional assistance using a variety of methods of neurological rehabilitation. In particular, the cost of dolphin therapy was considered reasonable. As a result, the District Court in Warsaw[76] awarded a pension in the amount of PLN 6,343.00 per month for the period from April to November 2013, then the amount of PLN 9,115.50 per month for the period from December 2013 to February 2020, and the amount of PLN 12,513.78 per month for the period from March 2020 and for the future.

It is worth noting that the periods mentioned of the pension above are indicative of the protracted nature of the proceedings. The lawsuit was

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74 As it seems, the accumulated evidence made it possible to recognize the claims of indirectly injured parties in this regard. Although the judgment of the District Court was based on the wrong legal basis (Article 448 of the Pol. Civ. Code), it was compliant with the law. The premise of the inability to establish or continue family ties contained in Article 446^2 of the Pol. Civ. Code does not apply to those seeking compensation, i.e. the parents (because they undoubtedly loved their disabled child), but to the directly injured person. On the other hand, from the wording of the justification it appears that: "Sometimes J. just smiles. He doesn't point fingers at anything. He doesn't talk. He does not communicate his needs and does not walk at all. Brother J. makes attempts to establish any contact with him. However, the effects are limited, as the District Court found, to eye contact and infrequent smiles in J.'s facial expressions."

75 Under the Act of 27 August 2004 on health care services financed from public funds (Journal of Laws, No. 210, item 2135, as amended) children are treated as family members of the insured, which refers to any person with citizenship of an EU or EFTA member state, or the United Kingdom, residing in these countries.

76 Ref: II C 277/13. The amount of the pension was upheld by a judgment of the Court of Appeal in Warsaw.

filed on 3 April 2013,[77] the judgment of the District Court was rendered on 20 October 2020, and the judgment of Appellate Courts in Warsaw was issued on 19 May 2022. In total, the case took nine years, including one year and six months in the second instance.[78]

Similarly, in the second case presented, which was resolved by the judgment of the Court of Appeal in Gdańsk on 21 April 2021,[79] the proceedings lasted eight years.[80] The amount of compensation demanded for a child born with asphyxia as a result of a delayed cesarean section was significantly higher than in the case heard by the Court of Appeal in Warsaw. It amounted to PLN 2,500,000. In this case, however, the damage was even more severe. The child had been diagnosed with encephalopathy, involving global psychomotor retardation, internal four-chamber hydrocephalus, bilateral optic nerve atrophy, microcephaly, quadriparesis with decreased muscle tone and bilateral pyramidal signs, thermoregulatory disorders, and chronic respiratory failure (the child was permanently attached to a ventilator).

As for the claim for compensation for the indirectly injured, it concerned the parents and two siblings. Since the Court of Appeal in Gdańsk ruled before the provisions of Article 446^2 of the Polish Civil Code came into effect, the benefits were based on the content of Article 448 of the Polish Civil Code. They amounted to PLN 50,000 (for each person). Due

77 Pursuant to Article 442^1 §1 of the Pol. Civ. Code, a claim for compensation for damage caused by a tort is time-barred at the expiration of three years from the date on which the injured party learned, or by exercising due diligence could have learned, of the damage and the person obligated to repair it. However, this period may not be longer than ten years from the date on which the event causing the damage occurred. The limitation contained in the last sentence, however, does not apply to personal injury, the limitation period for which, according to Article 442^1 §3 of the Pol. Civ. Code, cannot end earlier than the expiration of three years from the date on which the injured party learned of the damage and the person obligated to repair it.

78 In the Polish civil process, it is possible to request security for a claim for an annuity by obliging the defendant to pay periodically specified sums already in the course of the proceedings. Such a possibility was applied in the case at hand. In this connection, the civil liability insurer demanded a limitation of its liability.

79 Ref. I ACa 867/20, Legalis.

80 The process was filed on 12 February 2013, the Court of Appeal in Gdańsk, as the court of first instance, issued judgments on 20 October 2020 (XVC 1912/12). The case was considered by the Court of Appeal in Gdańsk for 6 months.

to the degree of influence of other factors (not attributable to the entity responsible for the treatment, as determined by the courts, there was a percentage reduction in the sums awarded in respect of all compensation claims (both property and non-property, in favor of directly and indirectly injured persons). Thus, the case is all the more interesting from the point of view of the analysis of perinatal neurological damage, because, as it turns out, the American concept of proportional liability is put into practice in Polish jurisprudence.

This concept is founded on the idea of proportional distribution of the burden of damage between the defendant and the plaintiff, which makes it possible to allocate responsibility for the damage, according to the degree of probability of the influence of certain factors on its occurrence.[81]

In the case under review, the Regional Court in Gdańsk found, relying on expert opinions, that the very poor condition of the child after delivery was the result of not only obvious negligence in the form of failure to perform a cesarean section in time, but also a probable intrauterine infection. Accordingly, it accepted a "contribution" (for factors other than negligence) at the level of 40% and drastically reduced the sums of the claims awarded to the directly and indirectly injured parties.

The Court of Appeal in Gdańsk, on the other hand, found that the percentage contribution of causes other than the defendant's negligence in childbirth adopted by the District Court was too high and revised it to 20%. Unfortunately, it is not clear from the reasoning of the Court of Appeal in Gdańsk how the courts determined these mathematical proportions[82]. It is therefore difficult not to criticize this reasoning, especially since the experts who gave opinions in the case pointed to other causes that could have affected the final extent of the damage, without operating with numbers. In light of the above, the following criticisms arise.

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[81] Ewa Bagińska, "Teoria odpowiedzialności częściowej (proportional liability jako koncepcja sprawiedliwego rozłożenia ciężaru odpowiedzialności deliktowej – wprowadzenie do problematyki," *Gdańskie Studia Prawnicze* 35 (2016): 51; Bagińska, "Związek przyczynowy," 665–6.

[82] Within the framework of cumulative causation, the District Court assumed that cause 1 (poorly conducted delivery) contributed to the occurrence of the effect with a 60% probability and cause 2 (intrauterine infection) contributed to the occurrence of the same effect with a 40% probability. In turn, according to the Court of Appeal, cause 1 constituted 80%, and cause 2 – 20% of the total damage.

Firstly, in light of the possibility that the cause of the injury was different from that alleged, the adequacy (normality) of the causal relationship between the cause of the injury alleged in the lawsuit and its effect should be questioned.[83] Note that based on the District Court's calculations, in light of the accepted theory of adequate causation,[84] one may wonder whether the first cause (misconduct at childbirth) contributing to the effect with a probability of no more than 60% should be considered legally relevant at all and result in the award of any claims for damages.[85]

Secondly, the issue of cumulative or alternative causation is typical of the so-called medical cases. In cases of this type, one often encounters a possible alternative series of causes that could also have led to the damage.[86] There are basically two situations. Alternative causation means that the damage results from many causes, and one of the causes may be attributed to the medical institution, while others are included in the so-called natural or injured sphere. In the case of alternative causation, each of the causes, due to its real impact, is capable of causing a violation of the injured party's legal rights. Therefore, the court should determine whether the cause indicated by the plaintiff is capable of causing damage.

Cumulative causation is characterized similarly in the sense that it is a type of competition of causes[87] and covers a situation in which the damage resulting from an event results from the joint action of two or more causes, but it is not possible to determine with certainty to what extent the damage

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83 Drozdowska, *Odpowiedzialność odszkodowawcza za zakażenia związane z opieką zdrowotną*, 431–7.

84 On the theory of adequate causation, see: Andrzej Koch, *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym* (Warsaw: PWN, 1975), passim.

85 The Polish law does not apply the percentage-based method of examining natural causation, typical of common law systems. The occurrence of an effect with only 51% probability does not allow for the assumption of a causal relationship, as is the case in common law systems. Compare: Ewa Bagińska, *Odpowiedzialność odszkodowawcza w razie niepewności związku przyczynowego* (Torun: TNOiK, 2013), 53–4.

86 See also considerations by Agata Wnukiewicz-Kozłowska and Urszula Drozdowska, "Causal Effect Relationship in Medical Cases. An Old Problem in a New Scenario. Commentary to CJEU Judgment (Second Chamber) of 21 June 2017, N.W. & Others v. Sanofi Pasteur MSD & Others, Case C-621/15, EU:C:2017:484. Approbative Gloss," *Review of European and Comparative Law* 46, no. 3 (2021): 263–90.

87 Koch, *Związek przyczynowy*, 202–7.

resulted from a specific cause.[88] Therefore, unlike alternative causation, a single cause would not have caused the harm in its entire scope, or would not have caused a harmful effect at all.[89] A typical example of this type of situation is a factual situation in which the causes of an event cannot be separated. At the same time, one of them remains, for example, in the zone controlled by the medical institution (e.g. surgery or another medical institution), while the second one remains in the natural sphere (e.g. the condition of the injured person due to which the person was hospitalized), and the third one, e.g. in the injured sphere (susceptibility to a given disease).

The position of the Polish law on this type of coincidence of causes is based on the assumption that the probability of establishing an effect should be considered only in relation to the cause of a given type (raised by the plaintiff), regardless of the fact that this effect resulted from other events at the same time.[90] The starting point is an appropriate reconstruction of the facts, which may result in the assumption of liability or the dismissal of the claim (in line with the all-or-nothing rule) due to objective uncertainty regarding the examination of the causal relationships in medicine.[91]

Thirdly, in the light of the civil law doctrine, neither a health predisposition nor injured party's initial health condition are treated as co-causes of the damage, much less as factors enabling the patient to have contributed to causing the damage (see Article 362 of the Polish Civil Code).[92] The causes included in the so-called natural sphere for which no one is responsible should therefore not result in a reduction of the due compensation if it is

88 Ewa Bagińska, "Odpowiedzialność cywilna w sytuacji tzw. przyczynowości kumulatywnej w świetle nowych kierunków rozwoju orzecznictwa," in *Z badań nad prawem prywatnym. Księga Pamiątkowa dedykowana Profesorowi Andrzejowi Kochowi*, eds. Adam Olejniczak, Marcin Orlicki, and Jakub Pokrzywniak (Poznań: Wydawnictwo Naukowe UAM, 2017), 28.

89 Maciej Kaliński, *Szkoda na mieniu i jej naprawienie* (Warsaw: C.H. Beck, 2008), 36–9.

90 Koch, *Związek przyczynowy*, 137.

91 Thus, *de lege ferenda*, one can consider adopting the concept of partial responsibility as corresponding to the sense of justice. However, it should be borne in mind that the concept of a high degree of probability that a given cause is causally related to the damage, used so far in Polish medical cases, usually results in the awarding of full compensation. On the other hand, thanks to the adoption of the concept of proportional liability in a situation where the injured party had little chance of receiving compensation (in accordance with the all or nothing rule), this proposal would give the person a chance of obtaining some compensation.

92 Drozdowska, *Odpowiedzialność odszkodowawcza za zakażenia związane z opieką zdrowotną*, 460–70.

established with a high degree of probability that the cause in question for which the medical entity is responsible could have caused the damage.

To sum up, the judgment of the Court of Appeal in Gdańsk is in contradiction of the views presented so far in the legal doctrine as well as of the previous jurisprudence of civil courts.[93]

Meanwhile, the approach to compensation for neurological perinatal injuries under no-fault systems, which do not provide for partial liability, is different. The event of a child being born with perinatal asphyxia is considered in the context of possible perinatal events involving mechanical trauma, i.e. damage to the brain or spinal cord, or fetal hypoxia during delivery. Since hypoxia undoubtedly occurred during delivery in the case under review, NICA programmes would most likely accept responsibility for compensating for the damage. Similarly, the described event would meet the conditions for a medical event within the meaning of Article 3 section 1 point 11 of the Law on Patients' Rights and the Patients' Ombudsman. According to this provision, a medical event is a bodily injury or health disorder[94] that could have been avoided with a high probability if health services were provided in accordance with current medical knowledge or if another available diagnostic or treatment method was used.

5. Conclusions

Although it exists in a very different context, the Polish judicial model has similar drawbacks as the American one, which include the lengthiness of the proceedings (as demonstrated by the two cases presented), the great uncertainty in establishing liability in terms of proving both fault and causation. As a result, similar objections to the judicial model and arguments in favor of no-fault liability as those outlined in the American literature can be formulated.

However, the shortcomings of the Polish judicial model, in the case of the occurrence of serious medical damage (and perinatal neurological damage is one of these), do not invalidate its importance. As the considerations

93 Ibid.

94 The legislator also mentions death and infection with a biological pathogen. These consequences are out of the question if a child is born with deficits caused by perinatal neurological damage.

outlined above have demonstrated, this model, due to the significant amounts awarded directly and indirectly to the victims, still represents the best response to the occurrence of serious perinatal neurological damage. The advantages of the Polish alternative procedure, such as its low cost, accessibility, and speed, cannot hide its basic disadvantage which is the fact that the upper limit on benefits awarded to the injured parties is too low.

Comparing sums awarded in the cases we have discussed with the amounts provided for in the Polish out-of-court model, it should be made clear that the PLN 200,000, which was the highest sum offered here, cannot even compensate for the property damage resulting from a serious perinatal neurological injury. This compensation scheme can only be used if applicants need to "probe" the possibility of winning in traditional civil proceedings. Note that, unlike the no-fault models of the states of Virginia and Florida, the applicant decides to reject the compensation offer only following the Ombudsman's decision. Thus, the choice to proceed before the Ombudsman does not lead to the abandonment of the judicial path at the outset, as happens when the case is accepted for hearing by the Industry Commission (in Virginia) or the Division of Administration Hearings (in Florida), respectively. What also draws attention when we compare it to the US model is the lack of mandatory participation in the fund by entities that have a vested interest in taking the burden of liability off their shoulders; namely, hospitals that have contracts with the NHF and their liability insurers. This is the case, even though these entities are the main beneficiaries of the solution.

In conclusion, the considerations outlined above have demonstrated that the main problem of the Polish no-fault model will continue to be the question of the amount of compensation awarded. Therefore, in the case of a serious perinatal neurological injury, the Polish no-fault model will not provide a satisfactory alternative to the judicial model for the injured patients and their families. The solutions it provides are general and, as such, do not reflect the specifics of neurological perinatal injury. Thus, the juxtaposition of the Polish and American perspectives clearly indicates the superiority of "sectional" no-fault models such as those dedicated to particular types of medical damage over general models, at least in cases of specific damage of major severity. This is unfortunate, because 35 years of experience in running NICA-type programs have shown that such programs,

above all, enable safe medical practice. The lengthy proceedings and high costs associated with litigation (especially when the outcome is uncertain) have made the NICA program an interesting alternative for parents of children with serious neurological defects resulting from childbirth, including compensation for serious property damage. The revealed "abuses" related to NICA MEDICAID's failure to pay for medical care provided to the program's clients (which involved a *de facto* deterioration in the quality of that care) had the effect of undermining parents' confidence in the program. To prevent this, in 2021, Florida raised the limits on one-time compensation from USD 100,000 to USD 250,000. In the event of a child's death, the one-time compensation of USD 10,000 was raised to USD 50,000. Subsequently, the number of directors (NICA board members) was increased from five to seven to include a parent (possibly a legal guardian) of a NICA participant and a representative of an organization that supports people with disabilities to ensure the proper operation of the program. This means that the programs are learning from their mistakes.

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