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Premises of Liability of a Person Who Assists in Causing Damage under Polish Civil Law

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Abstract: This study has been devoted to selected issues of assistance in causing damage and more specifically to the issue of the premises of liability for damages of a helper under Polish civil law. There is an important dispute in the Polish doctrine of law and in judicial practice as well, whether it is possible to accept liability for damages of the helper in the absence of his intentional fault. The work was prepared using a formal and dogmatic method. Under Polish tort law responsibility for aiding and abetting a damage requires the helper's intentional fault. The paper could be useful for academics and researchers dealing with the comparative tort law. The study raises arguments for the thesis that the *sine qua non* premise of a helper's civil responsibility is intentional fault. The study presents a critical analysis of the views of doctrine and case law.

Keywords: tort; civil responsibility; helper to a tort; intentional fault

Preface

Article 415 of the Polish Civil Code (1964) stipulates that whoever through his fault caused damage to another person is obliged to repair it. And Article 422 of the Civil Code clarifies that not only the one who caused damage (perpetrator) is liable, but also the one who convinced another person to cause damage (instigator) or was helpful to it (helper, assistant), as well as the one who knowingly benefited from the damage caused to the other (passer). If several persons are liable for damage caused by a tort, their liability is joint and several (Article 441 § 1 of the Civil Code).

Polish tort law including Articles 415, 422 of the Civil Code (1964) is a part of civil law. *De lege lata* in Poland applies the principle of unity of civil law. The principle of unity of civil law means that regulations governing professional trade

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(commercial law) do not create a separate branch of law, but is just a specialized branch of civil law. As a consequence Articles 415, 422 of the Civil Code apply both to entrepreneurs and non – entrepreneurs. The provision of Article 422 of the Civil Code applies not only to “typical” tortious relationships but might be used in the sphere of liability for violation of industrial property or in case of unfair competition (Strejmer, 2016, pp. 54-58), in the matter of responsibility of hosting service providers (Pacek, Wasilewski, 2000, pp. 26-320), liability of a shareholder who was helpful in causing damage to the company’s creditor in a company with legal personality (in other words, tortious liability for aiding and abetting may be relevant to the concept of “omitting legal personality” – piercing the corporate veil; Targosz, 2003, p. 23). The issue discussed in this study is therefore of great importance.

In Poland, court rulings are not the source of law. The source of law is, among others, law enacted by the Parliament. However, court rulings can be a non-binding model for interpreting law.

Assistance as a Kind of Activity in Causing Damage

The provision of Article 422 of the Civil Code states that not only the person who caused the damage (direct perpetrators of damage) is liable, but also the one who induced or helped another person to cause damage, as well as the one who knowingly benefited from damage caused to the other (Wałachowska, 2018, p. 450, Bieniek, 1996, p. 265, Stelmachowski, 1970, p. 65, Błahuta, 1972, p. 1027). The current provision of Article 422 of the Civil Code is the equivalent of Article 136 of the former Code of Obligations - 1933 (Lonchamps de Berier R., 1939 p. 2420. The responsibility of the helper and the direct perpetrator of the damage (as well as other accomplices, supporter, passer) is joint and several (Article 441 of the Civil Code, Ohanowicz, 1965, p. 94). The assistant (helper) assumes tort liability even if the direct perpetrator of the damage cannot be attributed e.g. due to insanity (Olejniczak, 2014, p. 389).

From the content of the cited legal norm of Article 422 of the Civil Code results, among others liability of one who was helpful to another person in causing damage. As P. Machnikowski claims, aiding means that someone does not participate in the event (act) causing the damage, but his behavior is necessary for this act to occur or makes it easier, safer, more reliable what to achieve effect, etc. (Machnikowski, 2009, p. 422). Aiding may take the form of intellectual and / or

physical support for the direct perpetrator of damage. Assistance of a helper may take place by action (*facere*) but also by omission (*non facere*). Another Authors points out that if one can distinguish subordinate and ancillary actions towards another person, an assistance should be sought. If behavior of several people is equal to each other, none dominate over the others, and all together create a factual situation that fulfills the hallmarks of self-inflicting acts of harm, this is more in line with the concept of complicity. This distinction is relevant when taking the view that the helper's responsibility takes place if only he can be accused of willful misconduct. Therefore, the literature on the subject adopts a relatively broad understanding of aiding (Olejniczak, 2014, p. 389, Karaszewski, 2014, p. 714).

A helper to cause damage can be not only a natural person but also a legal person (Article 33 of the Civil Code) or a statutory person (Article 33^1 of the Civil Code).

Premises of the Assistant's Civil Responsibility

The premises of the assistant's liability are similar to the structure of liability of the "direct" (main) perpetrator of damage. However, as it is considered in the literature, the helper "commits his own tort." (Karaszewski, 2014, p. 714).

The premises for tort liability are the following: (1) an event causing damage, (2) damage (within the meaning of Article 361 § 2 of the Civil Code – *damnum emergens* and *lucrum cessans*) and (3) an adequate causal link between the event causing damage and damage (within the meaning of Article 361 § 1 of the Civil Code), as well as (4) culpable actions of the helper. (Szpunar A. 1998, p. 51, Szpunar A. 1999, p. 68). The Supreme Court in its judgments of November 13, 1969, III PZP 39/69 (OSPiKA 1970, No. 7-8, item 150) and of October 30, 1963, II PR 363/65 (Nowe Prawo 1966, No. 6, p. 805) made the assistant's liability dependent on the existence of a causal relationship between his actions and the occurrence of damage. This view was confirmed by the Supreme Court in its judgment of January 23, 2007, III CSK 338/06, OSNC 2007, No. 12, item 187.

The concept of damage is not explicitly defined in the Civil Code. In the science of civil law, it is defined as the injury suffered by the injured person in all kinds of goods protected by law (Czachórski, 1994, p. 72, Dybowski, 1981, p. 213, Banaszczyk, 1997, p. 632). The central element of the institution of liability for damages is the emergence of the obligation to fulfill the compensation benefit. The so-called the principle of restitution means that it should be fully covered the loss

suffered (*damnum emergens*) and the lost profit (*lucrum cessans*) in the property of the injured person (Warkałło, 1972, p. 84).

In the case of a helper the premise of his responsibility is a causal relationship between his behavior and damage. In accordance with art. 361 § 1 of the Civil Code, a person obliged to compensation shall be liable only for the normal consequences of an act or omission resulting in damage. The Polish legislator based the causal relationship, therefore, on the concept of "adequate causality" and not on the concept of "sine qua non relationship". The helper is liable for damage in the amount in which it was caused by an act made using his help (Machnikowski, 2009, p. 422, Czachórski, 1994, p. 161). In contrast, it should be noted that liability of a passer knowingly taking advantage of damage caused to another deviates from the general rules adopted in the law of compensation. It is about the responsibility of a person whose behavior may not be in any causal relationship with the damage caused to the injured person, but passer is still responsible for his own act. "Awareness" of using someone else's damage means knowing about the use of damage done to others. In this sense, awareness in the form of knowledge is required in positive terms (judgment of the Supreme Court of 22 March 2019. IV CSK 443/17, unpublished).

It should be stressed that the assistant is, as a rule, responsible for all damage caused by the perpetrator. It is argued in the literature that the helper's predictions about its size do not matter (Machnikowski, 2009, p. 422). This view is- apparently- the result of striving for some simplifications in the compensation relationship.

The essential premise of the helper's liability is his fault (the so-called movable premise of liability; principle of responsibility). The assistant is not responsible on a risk or equitable basis.

In Polish civil law, the construction of fault refers to the French concept of fault as a two-element structure, combining two separate elements: subjective and objective. The objective element is consider as a necessary condition of the subjective element. The objective element referred to as unlawfulness means that the perpetrator's behavior is inconsistent with the law or the principles of social coexistence. This is an objective category of assessment. The perpetrator should be accused of this misbehavior. The subjective element of fault (sometimes referred to as a fault *sensu stricto*) is sometimes recognized in the sense given by the psychological theory. Perpetrator's awareness and the will of a specific behavior are directed towards behavior contrary to the legal order or the principle of social

coexistence. At present, however, prevails the understanding of fault according to normative theory. The fault is expressed in the possibility of accusing the perpetrator of inappropriate behavior. Therefore, the court applying the law will assess the perpetrator's mental attitude from the outside. It is based on comparing perpetrator's behavior with a certain type of conduct. Adopting the assessment *in abstracto* theoretically prevents situations that exist when using the assessment *in concreto*, where the perpetrator's psyche, consciousness, individual properties, etc. are examined. Therefore, an adequate model of conduct, comparison method and the scope of application of the assessment *in abstracto* need to be determined (Stelmachowski, 1984, pp. 318-319, Lewaszkiewicz – Petrykowska, 1956, pp. 60-61, Kaliński, 2009, p. 51).

The intentional act (intentional fault) occurs when a person acts with a conscious intention i.e. wants to commit a violation (*dolus directus*) or, by anticipating such a possibility, agrees to it (*dolus eventualis*). Fault may be unintentional in the formula of recklessness, where a person has an idea of the effect of the violation, but he unreasonably supposes that he will avoid it. Carelessness is a form of unintentional fault. In such a situation, a person has no idea as to the effect of not having their right action, even though they could and should have had it. Negligence is graded to ordinary and gross. This issue is related to the issue of the subjective element of fault.

From the point of view of general principles of civil liability, any degree of fault justifies the emergence of a state of liability and does not affect the extent of the liability of the perpetrator of damage (Banaszczyk, 1997, p. 761).

In the case of a legal person, when assessing the question of fault, one should take into account the behavior of the natural persons who are the members of the organs, in accordance with the so-called theory of organ. The behavior of natural persons acting as members of the body of a legal person is the behavior of a legal person: the direct perpetrator of the damage or - as appropriate - the behavior of the assistant. In other words, if the legal person is the direct perpetrator of the damage, the harbinger of the body of that legal person does not act as its assistants/heplers (Klein, 1985, pp. 122-123, Grzybowski, 1974, p. 373, Pazdan, 1969, pp. 205-206, Wolter, Ignatowicz, Stefaniuk, 1996, p. 196).

Intentional or Unintentional Fault of a Helper?

In the doctrine of civil law and in case law there is - as already mentioned at the beginning of this study - a certain dispute as to whether the fault of the helper under Article 422 of the Civil Code may be unintentional fault. *Prima facie* from reading Article 422 of the Civil Code it would be possible to conclude that the helper responds regardless of his fault. However, only with respect to the liability of the one who "knowingly took advantage of the damage caused to another" there is no doubt in civil law science that intentional fault is required in such a case (in the resolution of the Supreme Court of December 21, 2017, CZP 89/17, unpublished, it is stated that a passer is a person who knows that is benefiting from someone else's tort.).

Judgment of the Supreme Court of July 10, 1975 II CR 354/75 (unpublished) admitting the liability of an assistant acting without intentional fault was criticized in doctrine. It is emphasized that aiding cannot be reduced solely to objective circumstances and it is necessary for the assistant to include in his knowledge that he is providing assistance to the perpetrator of damage (Dubis, 2011, p. 763).

However G. Bieniek expressed his view that all categories of persons mentioned in Article 422 are jointly and severally liable for damage, and in principle regardless of the degree of fault, although fault is a premise for their liability (Bieniek, 1996, pp. 263 – 264).

Nevertheless, the dominant view of the civil law doctrine assumes that aiding and abetting can only take place as a result of willful misconduct. Some rational arguments support this position (Lewaszkiewicz – Petrykowska, 1978, p. 112, Pazdan, 2003, p. 340, Radwański, Olejniczak, 2005, p. 19, Szpunar, 1957, p. 287, Kondek, 2013, p. 488, 490, Adamus, 2014, pp. 32 – 43).

It is argued, therefore, that one cannot speak of the assistance of a person who does not realize that he is helpful in carrying out a tort. It is difficult to assume that if a given person, despite being unaware, that he helps in making a tort, he is responsible for the tort. Such reasoning would lead to socially unacceptable consequences (Banaszczyk, 1997, p. 809).

Another Author, M. Nesterowicz, accepted that aiding and abetting can be intentional or deliberate. However, a person who, despite the obligation incumbent on this person, did not prevent the act causing damage as a result of his negligence, is liable pursuant to Article 415 (Nesterowicz, 1989, p. 414).

There is a very strong voice of W. Czachórski who compares the provision of Article 422 of the Civil Code with terminology of criminal law: with an instigator and a helper (Czachórski, 1994, p. 161). Regulation of Article 422 of the Civil Code one can therefore, with some caution, compare with the content of Article 18 § 3 of the Criminal Code according to which one is responsible for aiding and abetting, who intends for another person to commit an offense, by his behavior facilitates its commission, in particular by providing a tool, a means of transport, providing advice or information; is also responsible for aiding and abetting, who, contrary to the legal obligation to prevent a criminal act by omission, makes it easier for another person to commit it. Used in the content of Article 18 § 3 of the Criminal Code the phrase 'intention' should be interpreted in accordance with the meaning given to it in Article 9 § 1 of the Criminal Code, referring to the form of intentional fault. An assistant - in the area of criminal law - cannot therefore act unintentionally (Pohl Ł. 2000, p. 79, Marek A. 2010, p. 55, Tyszkiewicz L. 2010, p. 78, Kardas P. 2012, p. 378, Supreme Court judgment of March 7, 2003, WA 8/03, R-OSNKW 2003, item 540, Supreme Court judgement of October 15, 2013, III KK 184/13, OSNKW 2014, No. 2, item 15). Similarly, the issue of aiding and abetting was related to the provisions of the former Code of 1969 (Gardocki L. 1995, p. 93).

However it should be remembered that in accordance with art. 11 of the Code of Civil Procedure, the findings of a criminal court issued in criminal proceedings in a final judgement as to the commission of a criminal offense shall bind the court in civil proceedings. The jurisprudence explains that the provision of art. 11 of the Code of Civil Procedure, which is of a procedural nature, does not regulate or prejudge the issue of civil liability (resolution of the Supreme Court of April 28, 1983, III CZP 14/83, OSNCP 1983/11/168; resolution of the Supreme Court of January 20, 1984, III CZP 71/83, OSNCP 1984/8/133; Supreme Court judgment of 17 June 2005, III CK 642/04, unpublished; Supreme Court judgment of 29 June 2016, III CSK 267/15, unpublished; Supreme Court judgment of 9 April 2015, II CSK 363/14). The essence of being bound by a criminal conviction is only that the civil court, while establishing the facts of the case, cannot ignore the act described in the operative part of the judgement issued by the criminal court. But there is a substantive civil law to determine all civil consequences of a criminal offence covered by a final judgement. It should also be considered that the binding force of a final criminal judgment relates to the features of the crime set out in the judgements and the circumstances of its commission, while circumstances beyond these elements of the facts are not binding in a civil case (judgment of the Supreme

Court of 22 March 2019. IV CSK 443/17, unpublished). A conviction for an intentional crime excludes, in the light of art. 11 of the Code of Civil Procedure, the possibility for a court in a civil case to determine the lack of intentional conduct of a perpetrator, while a conviction for an unintentional crime does not exclude the determination that the perpetrator acted intentionally (judgment of the Supreme Court of 22 March 2019. IV CSK 443/17, unpublished).

An interesting view in this matter, was expressed by P. Machnikowski, according to which the key element in the construction of assistance in causing damage is the awareness of the person providing assistance that it may contribute to the tort. The extension of liability for persons who only indirectly contribute to the damage and, in addition, do so unknowingly is unjustified. In other words, this author assumes that the key essence for the helper's responsibility is the helper's awareness of the importance of his actions (Machnikowski P. 2009, p. 422).

A similar opinion was raised in the jurisprudence of the Supreme Court. In the opinion of the court if it has not been proven that the defendant was aware that she was helping to extort property from the plaintiff, then the structure of her responsibility for aiding seems to be artificial and unconvincing (Judgment of the Supreme Court of July 17, 2003, III CKN 29/01, OSP 2005, No. 5, item 59).

An important position for the problem in question was taken by the Supreme Court in the judgment of 18 May 2017, III CSK 190/16 (unpublished). According to the Supreme Court, aiding and abetting can only be committed intentionally, although both in a direct and indirect intention. Only a person who interacts with the perpetrator of damage, i.e. one who helps him consciously, can be recognized as a helper. As a consequence only awareness of help with harmful action determines the helper's guilt. This view is compatible with the principles of equity.

In the above-mentioned doctrinal statements and in jurisprudence, it was found that the scope of the helper's awareness of the tort is of significant importance. This can be also explained by a simplified example. In the first variant, the person X borrows a can of gasoline from person Y to be carried to a person Z. Then person X uses the gasoline to ignite the possessions of person Z. The consciousness of Y is limited to the fact of lending X gasoline. In the second variant, the person X borrows a can of gasoline can from person Y in order to- about which person Y knows - set fire to the possessions of the person Z. Person X with the help of gasoline sets fire to the possessions of Z. The awareness of Y includes not only the fact of lending X gasoline but the intention of X to set fire to Z's possessions. It is

difficult to assume that in the first case Y is the helper of the perpetrator. There cannot be tort liability without the awareness of aiding and abetting a tort.

The interpretation of the law should follow the principle "*ius est ars boni et aqui*". The principle of equity relied on in case-law is therefore of primary importance.

Conclusion

The problem of the premises of the assistant's responsibility is not only of dogmatic importance. One should defend the view that a person is not liable for aiding and abetting if he is not aware that he is helping others to cause damage. Responsibility for aiding and abetting a damage requires the helper's intentional fault. The opposite view would not be compatible with the principles of equity.

De lege ferenda, in order to avoid any doubts, one should consider a possible change in the editing of Article 422 of the Civil Code: not only the person who caused the damage directly is responsible, but also the person who was deliberately helpful to another person in causing damage.

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