

## **Delictual liability (Latin *ex delicto* – arising from a wrongful act) by virtue of art. 415 of the Polish Civil Code**

**by**

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The legal doctrine adopted that civil liability consists in the suffering from consequences stipulated in the civil law by the party of the civil law relations with reference to facts evaluated negatively from the legal point of view and attributed to the entity by the civil law.<sup>2</sup> Such a presentation of civil liability may mean either subjective liability due to the fault, or objective liability, which may be determined regardless of the evaluation of the subjective aspect of the entity's activity.<sup>3</sup> The title of objective liability may be risk or rightness.

Civil law systems distinguish two civil liability regimes for damage: *ex delicto* and *ex contractu*. Delictual liability, contrary to contractual liability arises due to the commitment of a wrongful act, and not as a result of a failure to execute contractual obligations or their improper execution.

In Polish Civil Law civil liability arising from a wrongful act is regulated by art. 415-449 of the Civil Code. A fundamental law of this regime is art. 415 of the Civil Code: "Anyone who by fault on his part causes damage to another person is obliged to remedy it."

Art. 415 of the Civil Code defines a general rule for the liability for damage caused by **wrongful acts** (delictual liability). Wrongful acts are acts which result in civil law liability to redress damage, whereby delictual liability is normatively attributed to entities for unintentional behaviours or even acts not committed by these entities, however, in specific circumstances the legislator shall deem their liability justified.<sup>4</sup>

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<sup>2</sup> T. Dybowski (w:) Z. Radwański (red.), System prawa cywilnego, Prawo zobowiązań – część ogólna, t. III, cz. 1, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1981, s. 170.

<sup>3</sup> W. Lang, Struktura odpowiedzialności prawnej. Studium analityczne z dziedziny teorii prawa, Zeszyty Naukowe UMK, Toruń 1968, z. 8, s. 54–55.

<sup>4</sup> A. Olejniczak (w:) A.Kidyba (red) „, Kodeks Cywilny Komentarz, Tom III, Zobowiązania- część ogólna, lex 2010,poz1

By virtue of art. 415 of the Civil Code, a wrongful act arises only when the perpetrator infringes on a common obligation. Such position is established in court jurisdiction as well as literature. Thus, any failure to make an obligation may be deemed wrongful by virtue of 415 of the Civil Code. Such qualification of an act is only justified when accompanied by an infringement of a common obligation.<sup>5</sup> “A criterion for universality of rules governing proper and cautious behaviour is crucial to distinguish an event which assumes the form of a wrongful act from an event which is a failure to fulfil an obligation or its inadequate fulfilment”<sup>6</sup>

Liability for damages in respect of a wrongful act requires certain circumstances, for instance, an occurrence which lawfully refers to liability on a particular principle, damage and a casual relationship between a certain occurrence and the damage (art. 361 of the Civil Code et seq.)

The casual relationship between the act or omission of the liable party, and the result in the form of damage is an essential premise for liability for damages. It must be stressed that art. 361 § 1 of the Civil Code (A person obliged to pay compensation is liable only for normal consequences of the actions or omissions from which the damage arises.) links the liability only to the normal consequences of the underlying phenomena. “The concept which objectivises the category of ‘normality’ applicable in judicature consists in the fact that the determination of the casual relationship abandons the possibility to predict specific results of events as belonging to the category of subjective elements of liability in the form of guilt, and is limited to objectivised criteria deriving from the rules of social experience supported by scientific knowledge which allow for the assumption that a specific later event (result) is most frequently the result of a previous event (reason). Moreover, it is not important for this result to appear at all times, and therefore it does not have to be necessary; it is enough for it to be a typical consequence.”<sup>7</sup> The Supreme Court assumed that, by virtue of art. 361 § 1 of the Civil Code, the normal casual relationship between a specific occurrence and the damage exists when, in the case of a given configuration of relationships and conditions, and in normal circumstances, without any extraordinary events, damage is a normal consequence of such events. The evaluation whether or not a result is normal should be based on the entirety

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<sup>5</sup> Wyrok Sądu Najwyższego z dnia 10 października 1997 r., III CKN 202/97

<sup>6</sup> Wyrok Sądu Najwyższego z 10 października 1997 r., III CKN 202/97

<sup>7</sup> Wyrok Sądu Apelacyjnego w Poznaniu z dnia 10 sierpnia 2011 r. I ACa 1082/10, por. orzeczenia SN - z dnia 2 czerwca 1956 r., III Cr 515/56, OSN 1957/1/24, czy z dnia 15 stycznia 1970 r., I Cr 522/69, niepubl., i z nowszych: z dnia 12 lutego 2000 r., I CKU 111/97, z dnia 18 maja 2000 r., III CKN 810/98, z dnia 14 marca 2002 r., IV CKN 826/00)

of circumstances of the case and result from life experience as well as scientific and special knowledge.<sup>7</sup>

For its application, art. 415 of the Civil Code requires the determination of an event the party shall be liable for (the perpetrator's act), and circumstances which allow for or prevent an event from being deemed an intentional act.

A certain act may be attributed to an entity if the specific action may have been driven by the will of the entity. However, unconscious processes or events entirely independent of a person's will at a certain moment shall not be considered as perpetrated by man (forced by other persons' actions – physical constraint). Such behaviour may not be deemed an act of a particular party or give rise to delictual liability.

Behaviour deserving delictual liability by virtue of art. 415 of the Civil Code may be an **action** as well as an **omission**. An omission is a failure to take a particular action which an entity was able to or obliged to take.

In accordance with art. 415 of the Civil Code, the perpetrator shall bear delictual liability **by fault on his part**.

The legislator does not define the concept of guilt. „Judicature and literature popularised the view which designated two elements of guilt: an objective and a subjective one. An objective element is expressed when any behaviour which is not in accordance with the law or stipulated ethical rules is considered intentional. The subjective element is expressed when any behaviour which purposefully causes damage or negligence is considered intentional. By contrast, with reference to concepts developed in the doctrine of the criminal law, there is a concept prevalent in modern literature which depicts two features of an act (objective and subjective inappropriateness of behaviour) and limits the concept of fault to an element which qualifies behaviour harmful only due to the subjective features of the perpetrator.”<sup>8</sup> The Judgement of the District Court in Gdańsk as of 28 October 2010 III CA 389/10.

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<sup>7</sup> orzeczenie SN z dnia 2 czerwca 1956 r., III Cr 515/56, OSN 1957/1/24

<sup>8</sup> por. M. Sośniak, *Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone*, Kraków 1959, s. 78 i n.; A. Szpunar, *Nadużycie prawa podmiotowego*, Kraków 1947, s. 112 i n.; B. Lewaszkiewicz-Petrykowska, *Wina jako podstawa odpowiedzialności z tytułu czynów niedozwolonych*, SPE 1969, vol. II, s. 90; P. Machnikowski [w:] *System prawa prywatnego*, t. 6, s. 401 i n.; Z. Radwański, A. Olejniczak, *Zobowiązania*, 2008, nb 498; Z. Banaszczyk [w:] K. Pietrzykowski, *Komentarz*, t. I, 2009, art. 415, nb 13 i 14; G. Bieniek [w:] G. Bieniek, *Komentarz*, t. I, 2009, s. 297-298; W. Dubis [w:] E. Gniewek, *Komentarz*, 2008, art. 415, nb 11

The civil law does not define the concept of guilt. “With reference to the achievements of the criminal law, this concept is assumed to include two components: objective and subjective. The objective element means the non-compliance with the applicable norms of conduct, which is a broadly understood unlawfulness. The subjective element concerns the relationship between the will and consciousness with reference to the act. In short, fault may be laid on a legal entity only when there are any grounds for a negative evaluation of it’s behaviour from the perspective of both elements.” The Judgement of the Supreme Court as of 26<sup>th</sup> September 2003 IV CK 32/02

By virtue of the Judgement of the Supreme Court as of 12<sup>th</sup> June 2002 **III CKN 694/00** the circumstances of negligence have been depicted. “Any negligence of the notary within the scope of the factual content of the self-prepared notarial deeds of letters of attorney which resulted in deeming the sales agreement invalid, justifies its liability for the damage, as referred to in art. 415 of the Civil Code”

“A notary shall bear *ex delicto* liability for any damage caused as a result of the performance of notary activities, thus the liability of the notary to the client and third persons is legally justified in art. 415 of the Civil Code. To sum up, fundamental obligations of the notary result directly from the rules of the legal order and are binding for him with respect to his client and the third person equally. By virtue of the statute, the notary is obliged to exercise due diligence in the course of performance of his duties. Any infringement of the rights must be culpable (art. 415 of the Civil Code), however, considering the abstract evaluation of negligence (art. 355 § 1 of the Civil Code) and the professional nature of the notary’s activity (art. 355 § 2 of the Civil Code), the very fact of the infringement on them usually determines the fault, at least in the form of negligence.”

Importantly, “the guilt that may have not been adequate to confirm that the defendant committed a crime is adequate to acknowledge his civil liability, as, by virtue of art. 415 of the Civil Code, the least degree of fault of the perpetrator is sufficient to burden him with civil responsibility.” The Judgement of the Supreme Court as of 10<sup>th</sup> October 1975 I CR 656/75

Consequently, objective inappropriateness – unlawfulness constitutes a reason for deeming such behaviour culpable, as only unlawful behaviours may be qualified as culpable.<sup>9</sup>

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<sup>9</sup> Wyrok Sądu Okręgowego w Gdańsku z dnia 28 października 2010 r. III CA 389/10

“The determination of the unlawfulness of behaviour consists in the qualification of the perpetrator’s act as forbidden, by virtue of norms referred to by the legal system. In art. 415 of the Civil Code, the legislator does not establish the scope of the norms. Designating a very wide scope of the concept of unlawfulness, it is mainly directed by striving after the repair of damage caused as a result of behaviours commonly recognised as reprehensible. Therefore, unlawful acts are acts forbidden by the rules of law applicable in Poland, regardless of their sources (the RP Constitution or other laws, ratified international agreements, directives and local legal acts). The nature of the norms of conduct reconstructed on the basis of these laws must be abstract, imposing a common obligation of certain form of behaviour, in other words, ordering or forbidding certain behaviours in specific situations to designated entities. These may be norms of civil law or any other branch of law if they establish common obligations and not only obligations which refer to the legal relation between the parties (e.g. obligation, employment relationship). Due to the common nature of the legal protection of personal goods, any behaviour which infringes on personal goods will constitute a wrongful act.”<sup>10</sup> According to the judgement of the Supreme Court as of 28<sup>th</sup> February 2007 (V CSK 431/06, OSNC 2008/1/13), the imprisonment of a convicted person who serves a sentence of imprisonment in an overcrowded cell, where sanitary facilities are not separated from the rest of the room, or a failure to provide them individual places to sleep may constitute the breach of personal goods, such as dignity and the right to intimacy, and justify the liability of the State Treasury by virtue of art. 24 and 448 of the Civil Code.

From the perspective of delictual liability, a wrongful act is each behaviour contrary to the principles of community life or good practice, which are moral norms widely accepted in the whole society or social group, ordering or forbidding to behave in a certain way, despite the fact that it is not mandatory or forbidden by virtue of a legal norm.<sup>11</sup>

However, the perpetrator may be charged with unlawful, intentional or negligible behaviour only upon the investigation whether at the moment of the act commitment the perpetrator was sane, not under 13 year of age (art. 426 of the Civil Code) or not in a condition excluding a conscious or free decision and expression of will (art. 425 of the Civil Code).

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<sup>10</sup> Wyrok Sądu Okręgowego w Gdańsku z dnia 28 października 2010 r. III CA 389/10

<sup>11</sup> por. W. Dubis (w:) E. Gniewka (red.) Kodeks cywilny. Komentarz wyd. 2, Warszawa 2006, s. 696, Z. Banaszczyk (w:) K. Pietrzykowski, Komentarz, t. I, 2005, nb 23; G. Bieniek (w:) G. Bieniek, Komentarz, t. I, 2009, s. 296-297; W. Czachórski (w:) System prawa cywilnego, t. III, cz. 1, s. 534 P. Machnikowski [w:] System prawa prywatnego, t. 6, s. 381; Z. Radwański, A. Olejniczak, Zobowiązania, 2008, nb 500; por. Komentarz do art. 415 kodeksu cywilnego (Dz.U.64.16.93), [w:] A. Kidyba (red.); A. Olejniczak, A. Pyrzyńska, T. Sokołowski

In some circumstances, the behaviour of the entity may **not** be deemed unlawful, despite the breach of a common ban or order established by virtue of legal or moral norms. Such behaviours are referred to as countertypes, in other words, circumstances excluding the unlawfulness of an act. The Civil Code enlists the following circumstances which exclude the unlawfulness of the act: defence of necessity (art. 423 of the Civil Code), a state of absolute necessity (art. 424 of the Civil Code) or legally admissible self-help (art. 343 § 2 and art. 432 of the Civil Code). The annulment of decision about unlawfulness may also result from a situation not referred to in the Civil Code, such as: **acting at one's own risk** or the **consent of the injured party**.

The consent of the injured party is a circumstance which causes the annulment of the decision about unlawfulness only in the scope in which the injured party may use the disturbed goods. Therefore, one must always determine whether and in what scope the injured party was entitled to give consent to interfere in the sphere of the party's own goods. It must be stressed that the consent concerning the interference in the sphere of life protection is not effective as far as deprivation of life is concerned. Moreover, the consent concerning health disturbance and violation of bodily integrity is also considerably limited.<sup>12</sup>

Furthermore, the person who gives such consent must be fully aware of such violations, and their subsequent consequences. Otherwise, its consent is ineffective. It is worth indicating the judgement of the Supreme Court which proved that "the requirement concerning a patient's consent on a surgical treatment for aesthetic reasons shall be valid only upon the patient's being thoroughly informed even about special (more or less predictable) results of the interference which involves risk no higher than usual." The Judgement of the Supreme Court as of 5<sup>th</sup> September 1980 II CR 280/80.

Judicature assumes that "any risk taken by a patient who gives consent on a surgical treatment covers, however, only usual post-operative complications. Such consent shall not be considered to cover other complications resulting from a medical error." The Judgement of the Supreme Court as of 29<sup>th</sup> October 2003, III CK 34/02, OSP 2005, vol. 4, item 54).

Acting at one's own risk is another circumstance which excludes the unlawfulness of an act. The literature on the subject assumes that the injured party should not be able to claim for compensation for loss suffered as a result of events whose occurrence he should have

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<sup>12</sup> Por. Z. Banaszczyk (w:) Kodeks..., s. 1219; W. Dubis (w:) Kodeks..., s. 697, A. Olejniczak (w:) A.Kidyba (red) ,, Kodeks Cywilny Komentarz , Tom III, Zobowiązania- część ogólna, lex 2010, poz.21

taken into consideration. The basis for such position is the fact that the injured party exposed himself to familiar danger freely and voluntarily.<sup>13</sup>

In conclusion, the foregoing subject matter concerns the interpreted article 415 of the Civil Code, which establishes a general rule of liability for damage caused as a result of events referred to as a wrongful act (delictual liability). It must be stressed that the premises of delictual liability are: an event triggering the liability by virtue of a certain rule of the legal system as well as the damage and casual relationship between the event and the damage. By virtue of article 415 of the Civil Code, the perpetrator shall bear delictual liability by fault on his part. The lack of any of these premises means the exclusion of the perpetrator's liability. According to the general rule of the civil law (art. 6 of the Civil Code), the burden of proof lies on the person who claims for damages due to the commitment of a wrongful act.

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<sup>13</sup> Por. W. Dubis (w:) E. Gniewek, Komentarz, 2008, art. 415,s.698,