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The Scope of Exercising Public Authority in the Context of State (Treasury) Liability for Vaccinations Against COVID-19

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Zbigniew Banaszczyk[1]

Abstract:

Purpose: *The purpose of this paper is to investigate the possibility of attributing liability to the State (State Treasury) for damages suffered by individuals who undergo voluntary vaccination against COVID-19, introduced in Poland from December 2020.*
Design/Methodology/Approach: *The author employs a dogmatic method, analyzing the potential liability of the State on the assumption that there is currently no possibility to make a binding determination that the public authority's action in this regard can be judged as unlawful.*
Findings: *With this assumption in mind, the study shows that the Polish Civil Code provisions make State liability possible only if it is established that the actions of public authorities are peremptory in nature. It then becomes possible to apply Article 417[2] of the Civil Code, which constitues the liability of public authorities based on the principle of equity for the so-called legal damages.*
Practical implications: *Conclusions can be applied in lawsuits in the event of vaccine-induced damages.*
Originality/value: *The issue of tort liability for non-mandatory vaccinations, but administered by the State, has not been more widely analyzed by the Polish legislation so far.*

Keywords: *Vaccination, personal damage (injury), tort liability, exercise of public authroity, State Treasury.*

JEL Classification: *K13.*

Paper type: *Research paper.*

[1]*University of Warsaw, Poland, e-mail z.banaszczyk@banaszczyk.com;*

1. Introduction

Since the beginning of 2020, humanity has been struggling with the pandemic of the SARS - CoV 2 virus, causing COVID - 19 disease, which affects the populations of individual countries with varying degrees of severity. It is clear that the relevance and effectiveness of the set of protective measures taken in this regard by individual countries and international organizations can only be determined conclusively in the long term. The subject of this study is the scope of the exercise of public authority in the context of civil law liability of the State (State Treasury) for personal injuries caused by COVID-19 vaccinations.

The legal basis for attributing liability for damages to the State under this premise depends, first of all, on establishing the nature of the activities undertaken by state organs in the investigated area and on addressing a question whether they constitute manifestations of the exercise of the *imperium* or do they merely fall within the purview of dominant behaviors. Considering the former, the liability for damages caused by the organisation and, possibly, carrying out the anti-COVID-19 vaccination process will be based on a set of provisions regulating the liability of the State Treasury for damages caused by the exercise of public authority (Article 417 et seq. of the Civil Code). Considering the latter, it needs to be based on the provisions concerning tort liability for damages either for fault of the authorities (Article 416 of the Civil Code) or for the act commited under supervision (Article 430 of the Civil Code).

At the outset of these considerations, however, it should be noted that in the present state of knowledge about the pandemic and the limited (due to, inter alia, information chaos) possibility of assessing ways of counteracting its effects, it is impossible to determine whether the conduct of public authorities concerning the organisation of vaccines against COVID-19 can be authoritatively assessed as improper, let alone as illegal (unlawful).

In view of the above - until the current state of affairs is clarified, and for the purposes of the presented analysis, the correctness of actions taken in this regard by public authorities, is assumed. Thus, it is reasonable to eliminate those provisions from the scope of consideration that make the liability for damages dependent on a fault attributable to state authorities (Articles 416 and 430 of the Civil Code), as well as to entities with the participation of which state authorities carry out the dominant tasks entrusted to them, or which make the liability for damages dependent on unlawfulness, which is a prerequisite for damage liability regulated by Articles 417 and 417^1 of the Civil Code.

So far, the problem of the State's liability for the negative consequences of preventive vaccination has been the subject of doctrinal and case-law interest in relation to the legal status that existed before the amendment of the Civil Code by

the Act of 17 June 2004 amending the Civil Code and certain other acts (The Civil Code of 23 April, 1964; Journal of Laws 2004, no. 162, item 1692).

It is s worth recalling that, the State Treasury and both the State and local government entities were at that time liable for damages caused by their officers with regards to the course of exercising executive powers and in the course of dominant actions. Thus there was no need to decide whether the activities in the field of preventive vaccinations were the subject of the exercise of *imperium* or only of *dominion-like activities.* In that legal state, the jurisprudence - also approved by the doctrine - developed the view that a person who as a result of being subjected to compulsory vaccination suffered a serious deterioration of health, may claim compensation on the basis of Article 419 of the Civil Code (cf. II CR 310/68, II CR 325/68, OSPiKA 1969, as well as, in the part referring to this issue, III CZP 33/70, containing guidelines for the judiciary and court practice regarding the application of Articles 417-421 of the Civil Code).

This provision constituted the legal basis for the State Treasury's or another entity's (e.g. local government's) equitable liability and compensation for the harm caused by their officers' lawful conduct (for the so-called legal harm).

2. Literature Review

In the current legal state of affairs, the equivalent of the repealed Article 419 of the Civil Code is Article 417^2 of the Civil Code, which, however, refers only to cases of damages caused in the sphere of *imperium*. In connection with such a limited the scope of applying Article 417^2 of the Civil Code, the doctrine expressed the view that the invoked provision "does not constitute the basis for State Treasury liability for damages caused in the process of medical treatment, because the provision of medical services by the state does not constitute exercise of public authority (except for cases of compulsory treatment - e.g., mandatory vaccinations)" (Sobolewski, 2020).

In this respect, reference was made to the case law developed under Article 419 of the Civil Code, also indicating that damages caused "in the course of treatment could be compensated on the basis of Article 419 of the Civil Code because medical doctors had the status of state officials (see judgment of the Supreme Court of 28 September 1999, II CKN 511/98)" (Sobolewski, 2020). The view of exclusively dominant character of activity in the sphere of health care has not always been accepted in all its manifestations.

It is worth mentioning here the cases, recognized in case law and discussed in doctrine, of forced placement in psychiatric hospitals and related problems concerning the choice of currently valid legal bases for liability for damages caused by unjustified hospitalization in such units (cf. I CSK 148/13, I CSK 524/14, IV

CSK 792/14; Ciechorski 2015, pp. 24 et seq.; Banaszczyk, 2015, pp. 47-69; Janiszewska and Wnukiewicz-Kozłowska, 2016, pp. 29-57; Rovers, 2018).

The current inoculation against Covid-19 is voluntary, which means that refusal to submit to it does not trigger any sanctions by public authorities. This, however, does not in itself prejudge whether the State's activity in this field is a manifestation of sovereign or merely dominant activity. In the light of the preceding remarks, it is therefore obvious that the latter possibility excludes - as far as the indemnification of the damage resulting from submitting to those vaccinations is concerned - the application of the strict liability provided for in Article 417 et seq. of the Civil Code, which, after all, can only be attributed to entities exercising public authority.

The activity of the State, as well as the derivative activity of local governments, is expressed not only in behaviour treated as authoritative due to the possibility of using coercion, but also in constitutionally determined other areas, e.g., the organisation of health care or the education system, where the state is not under any obligation correlating with the entitlement of an individual. This area of state activity connected with the realisation of public tasks can and should - to some extent, at least - be treated as a manifestation of the exercise of public authority, even though in principle, it is not of authoritative character[2] (Banaszczyk, 2018; Bieniek, 2009).

However, it is not aurthoritative over an individual only when it is properly exercised, from the point of view of both the assessment of actions taken and the results achieved. It is because public tasks of the state are often executed with the use of private-law normative solutions (e.g., through the use of contractual elements), characterized by the voluntary participation of the individual. On the other hand, the state of affairs, in which the public tasks of the state are not carried out or are carried out incorrectly through the use of an inappropriate method, places citizens or organizational units participating in the performance of such a public task and deprived of the rights and means of protection, in a situation of actual coercion.

In the case of the COVID-19 vaccination, the actual coercion the citizens will be subjected to, may also result from the declared introduction of various types of tools, e.g. the so-called "passports", allowing for unrestricted, or even exclusive, use of a number of services, such as concerts, theater performances and other public events, air travel, etc. Such a state of affairs, placing responsibility on public authorities, should also give rise to their liability for damages, for the execution of which, the provisions of the Civil Code governing liability for damage caused by the exercise of

[2]*According to Bieniek the exercise of public authority involves activities which by their nature arise from the Constitution and other legal regulations. He writes: "The exercise of public power is usually connected with the possibility of an unrestricted shaping of the situation of an individual. Therefore, it is a matter of acting in such an area where the right and freedom of an individual may be violated by public authority".*

public authority (Article 417 et seq. of the Civil Code) are appropriate. (Cf. Banaszczyk, 2018, and more extensively Banaszczyk, 2012, pp. 107-110).

Such a view was met with criticism from other authors who point out that investigating the basis of liability should in such cases focus on the form of action of the entity performing public tasks and on the effects of such action caused in the legal sphere of its addressees (Bagińska, 2016, pp. 296 et seq.).

3. Discussion

Article 417^2 of the Civil Code establishes the liability of the State for personal injury arising during the lawful exercise of public authority. It extends the constitutional and legal right provided for in Article 77 (1) of the Constitution of the Republic of Poland, according to which everyone has the right to compensation for damages inflicted by unlawful action of a public authority unit. The *ratio legis* of the legal principle expressed in Article 417^2 of the Civil Code deserves full acceptance. It is based on the fact that in some cases even lawful exercise of public authority (*imperium*) may lead to damages which, in view of the specific subjective and objective circumstances in which they arise, should not leave the aggrieved party without the protection of compensation imposed in such situations on entities exercising public authority.

The regulation included in Article 417^2 of the Civil Code is limited to personal damage, i.e. damage that is, as a rule, more onerous than damage to the aggrieved party's property. The possibility to seek compensation on the basis of Article 417^2 of the Civil Code arises when the "circumstances, and especially the aggrieved party's inability to work or his/her difficult financial situation, indicate that the remedy is required under the equitable principle" (Banaszczyk. 2020, p. 1513 et seq.)

In the case of preventive vaccinations against infectious diseases, this solution is supported particularly by the fact that they are introduced not only in the interests of the individuals subjected to them, but also in the interests of society as a whole, as has been upheld by the Supreme Court (II CR 325/68) This is, after all, the logic of the State's actions, not only aimed at organizing preventive and voluntary vaccinations to limit the consequences of a pandemic, but also utilizing an extensive educational and media campaign. For this reason, the doctrine stresses that the exercise of public authority is not limited to the issuance of *sensu stricto* acts of authority, since examples may also include organisational or factual actions, if they are specific for the aforementioned authority (Wałachowska, 2018).

The question must therefore be answered as to whether the COVID-19 vaccination, although voluntary, constitutes an example of the exercise of public authority. In view of the circumstances where a widespread pro-vaccination campaign is one of the elements in the fight against the pandemic, it is argued in the following paragraphs against a notion, that, if inoculation is voluntary, then any action

facilitating it and undertaken by the State is not a manifestation of the exercised public authority.

Article 64 (4) of the Constitution of the Republic of Poland provides that public authorities are obliged to combat epidemic diseases. In fulfilling this obligation since the beginning of the pandemic, and using the provisions of the Act on Prevention and Control of Infections and Infectious Diseases the government has taken measures to limit the spread of the virus and minimize the negative effects of the pandemic. Decisions such as the periodic ban on trading in shopping malls and the ban on unrestricted movement are clear examples of the exercise of public authority[3]. Section 19 of the Act on Prevention and Control of Infections and Infectious Diseases states that one of the means available to public authority in combating an epidemic is vaccination, which may be mandatory or "recommended."

On December 8, 2020, the government announced the draft of the National Vaccination Program against COVID-19. In the justification, the project proponents indicated that *"our goal (i.e. the goal of the government administration - author's note) is to carry out a vaccination program through which we are to achieve immunity of the population"*. It was further indicated that the coronavirus vaccination campaign *"[...] is one of the largest logistical operations of the last few decades. The entire process will be conducted in a citizen-friendly manner."* In addition to the justification of the project, an article posted on the government's information website indicated that a ready-made vaccination strategy is planned to be adopted on December 15, 2020, and before the vaccination *"[...] the government plans to conduct a large information and pro-frequency campaign. All this in order to encourage as many citizens as possible to get vaccinated"*. The title of the referenced article begins with the words *"effectiveness and safety"* (Serwis Rzeczypospolitej Polskiej, 2021) .

One of the circumstances supporting the fact that the vaccination campaign against the coronavirus is a manifestation of the exercise of public authority is the fact that the State, acting as the exclusive importer and the entity that decides (currently through the Governmental Strategic Reserves Agency[4]) - on the distribution of vaccines, has established a schedule for offering them to individuals classified in particular social groups, according to the degree of risk of infection with the virus. Pursuant to the Cabinet Ordinance of January 14, 2021, COVID-19 immunization providers are required to administer them in the order specified in the the Ordinance (Ordinance of the Council of Ministers, 2021).

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[3]*Another issue, not addressed in this article, is the possible liability of the state for failure to apply the solutions provided by the Emergency Law in this case.*

[4]*Under the provisions of the Governmental Strategic Reserves Act of 17 December 2020 (Journal of Laws 2021.255), which came into force on 23.02.2021, and replaced the former Material Reserves Agency.*

The above clearly indicates that the organization of the National Vaccination Program as well as its implementation is a manifestation of the performance of *imperium* activities. The provision of Article 417^2 of the Civil Code is intended to enable compensation for personal damage caused by lawful exercise of public authority undertaken in the general interest (Olejniczak, 2014).

Therefore, as the doctrine rightly emphasizes, when assessing the legitimacy of claims asserted on the basis of Article 417^2 of the Civil Code, all circumstances of the case should be taken into account, that is, the situation in which the damage was inflicted, the motives for the action taken, the type and significance of the interest protected (Rzetecka-Gil, 2011).

In relation to the content of the formerly binding Article 419 of the Civil Code, the Supreme Court accepted, in the resolution of the full panel of its Civil Chamber on 15 February 1971, III CZP 33/70, that, in view of the realisation of the public interest as a criterion, it would be justified *"e.g. to award compensation to a child who, as a result of a correctly administered smallpox vaccination, becames incapacited, because the damage occurred in the execution of a general objective undertaken for the common good."*

Undoubtedly, the main objective of the government in implementing the COVID-19 vaccination program is to protect public health. Swift spread of the coronavirus results in the government successively introducing unprecedented restrictions that threaten civil liberties or the functioning of the economy. Therefore, the efficient execution of the pro-vaccination campaign serves the general interest, which is in this case expressed by the preservation of public health. Therefore, no one is surprised by the momentum with which the State - through various information campaigns - encourages citizens to submit to inoculation.

An individual citizen's decision to receive a vaccine is also dictated - at least in part - by the pursuit of the above defined general interest. The voluntariness of this decision is in fact limited by the circumstances. The authorities argue that vaccination is an expression of responsibility towards the rest of society. The specificity of a pandemic indicates that the attitudes of individuals translate into the situation of the entire society.

As is well known, COVID-19 disease, while being a serious threat to the lives of seniors or chronically ill people, is also, as it now turns out and in terms of new mutations of the virus, a danger to younger people. Hence the decision to vaccinate, motivated by mutual and dependent self-interest and the general interest. It should also be noted that the voluntary decision to be vaccinated is made within the framework of clear government assurances that it is completely safe to receive the vaccine.

4. Conclusions

In this state of affairs, a distinction can easily be made between a situation in which a citizen, on his own initiative and primarily pursuing his own private interest, decides to be vaccinated against e.g. an exotic disease, motivated by travel to a place where the disease is prevalent, and a voluntary decision to be vaccinated against a coronavirus as part of a project defined by the government as a "National Vaccination Program" in order to "return to normality".

For these reasons it has to be assumed that the mere lack of compulsion to undergo COVID-19 vaccination cannot prove that a mass vaccination campaign conducted by the state is not a manifestation of the exercise of public power and therefore an action in the sphere of *imperium*. In the case law, and in particular in the aforementioned resolution of the full panel of the Civil Chamber of the Supreme Court of 15 February 1971, the Supreme Court accepted that "*actions undertaken in the general interest should also include the performance - even with the patient's consent - of a previously unused medical procedure, the application of which is important for the development of new methods of treatment"*.

Translating the quoted position into the context of the present discussion, it should be pointed out that the vaccine against coronavirus was developed at an extremely fast pace, and the possible and especially remote in time, side effects resulting from its use are not yet precisely known. Nevertheless, it is known that a pandemic ultimately poses a far greater threat than the relatively rare adverse vaccine reactions. Universal vaccination will certainly be fundamental to extinguishing a pandemic, which is clearly in the general interest, and much broader than the development of new treatments alone.

As is also clear from media reports, the agreements signed by the EU with vaccine manufacturers exclude the latter from liability (Domagalski, 2020). For this reason, it has also been announced that a compensation fund will be set up to guarantee financial aid to the aggrieved suffering a negative reaction to vaccines.

In the light of the above, there is no doubt that if, as a result of administering the COVID-19 vaccine, personal injury is inflicted and bears consequence in the aggrieved party’s inability to work or his or her severely worse material situation, the principle of equity requires that he or she be awarded compensation on the basis of Article 417^2 of the Civil Code. The adoption of an alternative view would lead to a situation where an individual who had complied with the authorities' appeals and had been assured that there were no dangers associated with the vaccination, and who had undergone the vaccination, might suffer damage and bear its consequences without assistance.

The possibility of application of Article 417^2 of the Civil Code significantly prevents such a situation, limiting in two ways, however, the harm which the aggrieved party

may claim compensation for. Firstly, such pecuniary damage in the form of personal damage is excluded from legal relevance (Olejniczak, 2014). Moreover, the amount of damages claimed in connection with inflicting such damage may be subject to mitigation by the compensation court[5].

As the Court of Appeals in Łódź pointed out, this regulation aims to mitigate particularly severe consequences of inflicted damage, which cannot be removed on the basis of general provisions (I ACa 1613/13). Principles of equity indicate that it would be inadmissible to leave such aggrieved party without any compensation, which means that claims for compensation of particularly severe personal damage should be considered justified when they have been caused by actions encouraged by an entity representing the public interest in the name of the common good (Karaszewski, 2018)

Since preventive vaccination against COVID-19 is carried out in the interest of society as a whole, as well as in the interest of each and every citizen, a situation in which, a person subjected to vaccination suffers a deterioration of health, as a result of the vaccination, the principles of community life speak in favour of awarding such compensation, certainly also when the post-vaccination complications revealed may contribute to the development of medical knowledge (I ACa 1160/12) .

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[5] *This is evident from the wording of the provision itself, which entitles the injured party to claim full or partial compensation for personal injury.*

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