

UDC 351.741(438)

Panchenko O. – Postgraduate Student of the Department of Civil Law and Procedure of the National Academy of Internal Affairs, Kyiv, Ukraine

CIVIL LIABILITY OF THE POLICE IN THE REBUBLIC OF POLAND

The article deals with the problem of civil liability of police officers for damage caused during the performance of their official duties in the Republic of Poland. Since the reform of the police in this country took place nearly twenty years ago, and as a result of it only positive changes, which were acknowledged both by the population of the Republic of Poland and the leaders of other European states, were made, one can safely assert that borrowing of such a positive experience is highly desirable for Ukraine.

Keywords: civil liability, police, the structure of civil offense, property damage, annuity, moral damage, amount of compensation.

The National Police of Ukraine began its work on the 7th of November 2015, and due to the short duration of its activity, there are still many issues related to its functioning, which require clarification and legal regulation. Instead, the work's organization of this agency in European countries has a long history, so it is quite logical to apply to the practice of those countries where law enforcement agencies have undergone their reform more than a decade ago and are currently meet all the requirements of a democratic law-governed state. The adoption of positive foreign experience and its application into the activity of the Ukrainian law-enforcement system is a guarantee that the newly formed police will work according to the principles of correlation with public and protection of its interests that will really differ from ex-militia, which was to a large extent a punitive body. In addition, our state is a candidate to a membership of the European Union, and therefore it must ensure the stable and reliable functioning of those state institutions that care for protection of human and citizen's rights and freedoms.

As the part of our study, we are interested in the issue of civil liability of police officers for the damage caused during the performance of their official duties. For the purpose of borrowing positive experience, we will apply to the legislation of our closest neighbor – the Republic of Poland, where the police's reform took place almost twenty years ago, and will find out how this matter is regulated in this state.

The reform of the Polish police had been lasting for almost a decade, and the most global reforms took place during the period of 1995–1999. The reforms that occurred in 1995 secured the legal basis of the police, which became a force serving the society, and not a militarized agency. The second reform was even more significant. It took place in 1999 and introduced amendments to some laws that defined the competence of public administration. As a result of this reform, the police, remaining a structure separate from the national administration, became a part of the joint administration of the province and the district, associating with the state administration at the level of the province and with the local body – at the district level. The current police structure meets all the formal requirements of the democratic and law-governed state. From the point of view of the role and powers of the police, its activity should be measured by the level of protection of people's lives, their health and property, as well as observance of human rights and freedoms [1, p. 79–82].

The main legal act, that guides the activity of the National Police of the Republic of Poland, is the Law «About the Police» enacted on the 6th of April 1990 (hereinafter referred to as the Law) [2, p. 358]. According to paragraph 1 (hereinafter referred to as par.) of this Law, the Police of the Republic of Poland is an assembled and armed formation which serves the public and is intended to protect people's safety, as well as to maintain security and public order.

In accordance with part 3 (hereinafter referred to as pt.) par. 14 of the Law, during the performance of their official duties, listed in par. 1 of the Law, policemen must respect human dignity and protect human rights. Within the limits of the incumbent authorities, the police have the right to perform a number of actions (operative-search, investigative and administrative) in order to detect, prevent and expose crimes and misdemeanors; however, these actions should be carried out in such a way as to minimize the risk of violation of person's rights and interests. For example, detention can

only be applied if other means have proved useless or ineffective (pt. 2 of par. 15 of the Law).

The Constitution of the Republic of Poland, which was also enacted during the period of reforms (on the 2nd of April 1997) [3], registers basic and inviolable rights of Polish nation, which the Police of the country is obliged to respect and to protect. Yes, par. 38 of the Basic Law stipulates that every person is guaranteed the legal protection of his (her) life. Everyone is provided with personal inviolability and liberty according to par. 41. Deprivation or custodial restraint is possible only for certain reasons and in the manner prescribed by law. Anyone who is deprived of his freedom not on the basis of a judicial judgment has the right to apply to the court for the prompt ascertainment of the legality of this deprivation. The family of the detainee or the person, determined by him, should be immediately informed about the fact of detention. Every detainee should be immediately and understandably informed about the reasons for his (her) arrest. Within 48 hours from the moment of detention, he (she) should be transferred to court. The detainee should be released if, within 24 hours from the moment of his (her) transfer to court, he (she) would not be served with a court order about the temporary arrest jointly with the accusation. Every detainee should be humanely dealt with. A person is considered innocent until his (her) guilt is confirmed by the verdict of the court, which has become legally valid (pt. 3 of par. 42).

Anyone who is illegally deprived of liberty has the right to compensation for damage according to the pt. 5 of par. 41 of the Constitution. This principle is also confirmed by par. 77, which provides that a person has the right to compensation for damage caused to him (her) by an act of public authority that doesn't suit law. The law cannot close the way for anyone for restoring judicially violated freedoms or rights. Anyone whose constitutional rights or freedoms have been violated, has the right, in accordance with the statutory regulations, to submit a complaint to the Constitutional Tribunal on the issue about the compliance to the Constitution of a law or other normative act on the basis of which the court or public administration has made a final decision about his (her) rights and freedom or about his (her) duties, established by the Constitution (par. 79). Moreover, according to par. 80, a person has the right to apply to Civil Rights Defender with a request for assistance in protection of his (her) freedoms or rights violated by public authorities.

The Law does not directly specify the mechanism and grounds for bringing policemen to civil liability for violating rights and freedoms of citizens, but in some articles one can find references to the Civil Code of the Republic of Poland (hereinafter – the Civil Code) [4] about the regulation of this issue. For example, pt. 3 par. 20 of the Law «About the Police» states that if it is necessary for effective prevention of crimes specified in pt. 1 of par. 19 of the Law, or their disclosure or ascertainment and obtaining evidence, the police may use information related to the terms of insurance, in particular, data processed by insurers, information concerning individuals, including persons who have concluded insurance contracts, as well as information constituting bank secrecy and processed by banks. According to the provisions of pt. 4 of this paragraph, such information and data are subject to protection provided by the requirements for protection of unclassified information; the access to it may only be provided to the policemen who are acting in this case, their leaders, courts and prosecutors, if it is done for the purpose of prosecution. In the event of violation of the requirements, prescribed by pt. 4, the state is liable for damages on the basis of principles established by the Civil Code at the expense of its budget. So, in order to solve the issue about the grounds for bringing the policemen to civil liability and the amount of compensation, it is necessary to apply directly to the Civil Code.

Provisions regulating the protection of civil rights and interests of individuals are contained in section VI of the Civil Code, which is entitled «Tort». Par. 415 of this section states that everyone who causes damage to another person by his own fault is obliged to compensate such damage. A legal entity is also responsible for damage inflicted on the victim and must reimburse it (par. 416).

There is no legal definition of damage in Polish law. In legal literature and in case law, the damage is considered to be all that causes damage to person's property or personal interests protected by law, if these losses are inflicted on a person against his (her) will [5, p. 22–24]. At the same time, scholars and judges, discussing the definition of «damage» provided by the Civil Code, traditionally divide it into damage caused to property and moral injury.

The term «personal injury» doesn't have a detailed definition in Polish law, but par. 444 of the Civil Code briefly formulates it as «bodily harm or damage to health». Thus, it becomes clear that any physical damage, as well as other damage, that causes the

disfunction of internal organs, even in the absence of visible injuries, is subject to reimbursement. Under the definition «other damage» one understands mental illnesses, as well as mental injuries that may have a temporary nature.

There are three types of damage to be compensated according to the general rule in Polish law: personal injury, property damage and damage to the environment. In this context, the issue remains whether the concept of personal injury (the damage caused to a person) includes the violation of person's interests which is usually covered by a broader understanding of the category of «damage». At present lawyers are inclined to use a broader definition of personal injury, but its traditional definition is still generally used in judicial practice (that is, only the concepts of bodily harm and mental harm are covered). Consequently, the problems related to compensation for the violation of personal interests still remain (for example, for slander, invasion of private life, etc.) [6].

Polish tort law is a «general model of responsibility», unlike the German model of «protected interests». In accordance with the rule formulated by par. 415 of the Civil Code, tort liability occurs in the presence of fault of the delinquent. This paragraph is supplemented by a number of other special provisions contained both in the Civil Code itself and in other normative acts regulating the issue of tort liability in certain situations. Although some provisions of these regulations are also based on person's fault, others include examples of objective liability (liability without fault), unlimited liability (regardless of the existence of fault) or liability based on the principle of equity.

At the beginning the fault was the only reason for prosecution, but with the development of civil law science, the risk was recognized by lawyers as no less important and autonomous basis of civil liability. However, it should be a special provision for this, otherwise the case will be solved on the basis of general provision about liability (that is, in the presence of delinquent's fault). Under Polish law, so called liability without fault is possible only in three cases: 1) when the damage is caused to a person as a result of unlawful actions of public authorities or their officials (par. 417 of the Civil Code). Police officers who violate the rights and interests of the person are liable on the basis of this article; 2) when the damage is caused by an animal (par. 431 of the Civil Code); 3) when the damage is caused by a minor or incapacitated person (par. 427 of the Civil Code). In such cases, the courts generally release the

plaintiff from need to prove the causal link between the harm and the harmful consequence that occurred and impose the obligation to compensate the damage to the proper defendant, who, however, is not the direct offender.

The existence of causal link as the third requirement for prosecution is based on the theory of «sufficient causality». So, pt. 1 par. 361 of the Civil Code stipulates that «the person who is obliged to pay compensation is responsible only for normal consequences of his (her) act or omission which caused the damage...» In Polish civil law it is known as the principle of «sufficient causality». It realizes two functions: first, it is a precondition for rising of liability (causal link between the harm done and the harmful act); and secondly, it limits the size of damage done. Courts use criterions that are objective in terms of life experience and science to establish «sufficient causality».

As to the burden of substantiating the existence of causal link, then, according to par. 6 of the Civil Code it is relied on victim. Legislation does not determine common rules on ways of substantiating, but Polish courts traditionally require «possibility that borders on certainty». This means that the judge must be convinced *durante absentia* reasonable doubt. However, over the past decades, the shift from the «possibility that borders on certainty» to «a sufficient degree of possibility» has occurred [7, p. 253, 256]. This change allowed courts to award compensation in more difficult cases, for example, in cases when the person's insult takes place.

Regarding the amount of damage's compensation, Polish civil law applies the principle of full reparation, although there are many exceptions to this rule (both established by law and by contract). The amount of compensation should be equivalent to size of the damage done and not higher than it. It is established on the basis of rules stipulated in pars. 361–363 and pars. 444–449 of the Civil Code.

All kinds of damage are subject to compensation, which follows from the principle of full compensation for damage. Material (cash) losses should be reimbursed in each case. In accordance with pt. 2 par. 361 of the Civil Code losses are: direct losses (*damnum emergens*) and loss of profit (*lucrum cessans*). Consequently, in the absence of provisions of the law or treaty that indicate otherwise, the injured party has the right to reimbursement of losses he (she) suffered, as well as the revenues which it would have been able to obtain if it had not been harmed.

Regarding moral damage, it is only subject to compensation when it is directly provided by law. As a rule, moral damage is not compensated for breach of contractual obligations, except in cases when breach of contract is not concurrently a tort (coincidence of obligations). In this case, the same provisions of the Civil Code governing the issue of tort liability apply to the claim for compensation of moral damage.

Consequently, a claim for compensation of moral damage may be filed by a victim in the following cases: a) in case of causation bodily harm or other health disorders (clause 1 pt. 1 par. 445); b) illegal deprivation of liberty (pt. 2 par. 445); c) rape or sexual perversion (pt. 2 par. 445); d) violation of personal rights and interests (par. 448).

Some individual legal acts may provide for other cases for compensation of moral damage. These are, for example, the laws governing healthcare (in case of violation of patient's rights), intellectual property (copyright infringement), criminal law (illegal conviction, arrest or detention).

Issues of civil liability of public authorities and their officials are regulated in pars. 417–421 of the Civil Code. Thus, par. 417 stipulates that the State Treasury, a local body or another person performing functions of state power under law are liable for any damage caused as a result of unlawful act or omission during the performance of such functions. If performance of public authorities' tasks is realized in accordance with an agreement concluded with a local body or another legal entity, the joint responsibility for any damage done should be borne by the person performing the functions provided by the contract and the local body that gave the permission or the State Treasury.

In case of bodily harm or a health disorder, the compensation of damage shall include all expenses necessary for treatment of the victim and his (her) subsequent rehabilitation (par. 444 of the Civil Code). Studying the practice of Polish courts, one can conclude that such costs include: the cost of in-patient and out-patient treatment, calling of a doctor or nurse, travels related to treatment, rooming in another city; expenses related to rehabilitation, purchase of drugs, implants, medical devices or medical equipment needed for further treatment or satisfaction of victim's daily needs (for example, glasses, hearing-aids, wheelchairs or special vehicles, etc.). The claimant's income is also subject to compensation if, over the harm

caused to him, he was unable to work for a while. Compensation is paid directly to the victim of the offense or to other persons (for example, members of the family, if the victim is a minor).

At the request of the injured party, the person who is obliged to compensate the damage pays the amount necessary to cover the medical expenses, in advance. If the plaintiff becomes an invalid as a result of a committed offense, the offender is also obliged to provide funds necessary for victim's preparation to another kind of occupation.

In addition, there is another model of compensation for damage in tort law of the Republic of Poland – in form of annuitant (annual payments). Pt. 2 par. 444 of the Civil Code establishes that in case of victim's full or partial loss of working capacity, the growth of his (her) needs or reduction of his (her) prospects for the future, he (she) may require appropriate annual payments from the person who is obliged to compensate for damage. Any of these three grounds for annuity, which exists independently or concurrently with others, is a sufficient reason to sue. However, according to case law, an annuitant based on disability or loss of prospects for the future (for example, inability to engage in a particular profession or obtain specialization) cannot be granted to a minor. The latter, however, may require annual payments for motives that his (her) needs have increased (this includes, for example, the constant expenses for treatment, care and assistance of third parties). On the other hand, the annuitant for disability should be equivalent to the amount of income the victim expected to receive if he had not been harmed. Annual payments may also be awarded to a person who does not work, but keeps house.

As a rule, when awarding the annuitant, a general assessment of pecuniary damage, including loss of earnings and loss of work capacity is made. Polish courts proceed from the assumption that in case of loss or reduction of working capacity, the damage cannot be abstract, that is, it needs to be proved. Accordingly, the amount of damage is calculated as the difference between what the victim could get if he (she) had not been harmed and what he (she) would actually receive after the infliction. At the same time, the victim's income should be compared to the pay or its absence before the committed offense, but to that the claimant could earn if the offense had not occurred. It is sufficient if the victim would be able to prove the high possibility of receiving this income. The amount of annual

payments should correspond to size of the expected income, and a court appoints it at its own discretion [6].

According to par. 447 of the Civil Code a court may nominate a disposable monetary compensation instead of annuity at the request of the victim and in the presence of sufficient grounds. In particular, this applies to the case when the victim becomes invalid as a result of the offense, and a disposable compensation will help him to master a new type of activity. At the same time, the plaintiff is obliged to prove the existence of «sufficient grounds». The size of the disposable payment is based on the amount of annuitant the victim has the right to.

In case of damage is caused as a result of lawful actions of public authorities or their officials, the injured party may also claim full or partial compensation if the circumstances, in particular, the victim's loss of working capacity or his (her) difficult financial position, requires him (her) to be compensated on the basis of the principle of justice (par. 417² of the Civil Code).

The legislation does not set the maximum or minimum amount of compensation for property damage inflicted by illegal or lawful actions of public authorities or their officials. Each case is judged individually by court, which takes into account all the circumstances of the case, such as: loss of money, loss of income or property, personal difficulties, etc.

If, as a result of bodily harm or health disorder, the injured party dies, the culpable must compensate medical expenses and funeral expenses to the person who is suffering from these expenses. A person whom the deceased had to keep under the law may require annual payments. The right to claim annuitant also applies to those individuals who were voluntarily and permanently maintained by the victim. The court may award appropriate compensation to relatives of the deceased if, as a result of his (her) death their standard of life has deteriorated significantly, as well as the corresponding amount of compensation for the harm done (Art. 446).

As for compensation of moral damage caused by unlawful actions of police in the republic of Poland the only reason for this is unlawful imprisonment, as was explained above. To determine the amount of compensation, courts should ascertain all the circumstances of the case, namely: the degree of physical and mental suffering and how long do they last; whether injuries are permanent or temporary; whether the expected duration or quality of

life may be reduced because of injuries done, etc. The amount of compensation depends also on delinquent's fault: the higher is the degree of his (her) fault, the higher is the amount of compensation for moral damage.

The legislator does not determine the exact amount of compensation for moral damage, but the payment of insignificant sum that doesn't suit for the seriousness of violation, contradicts to the requirements of the legislation of the Republic of Poland and international treaties which the county signed, in particular to pt. 5 of par. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since it makes the right secured in these provisions theoretical or illusory. The amount of compensation cannot be significantly lower than that is awarded by courts in similar cases [8, p. 36].

For the claim for compensation for damage caused by tort is applied the limitation period of three years from the day when the injured party learned of the harm or of the person who is obliged to compensate it. However, this period may not exceed ten years from the day when the act that caused the harm has occurred. If the damage is caused as a result of a crime or offense, the claim for its compensation may be filed within twenty years from the date of perpetration of crime or offense, regardless of when the injured party learned about the harm or the person who is obliged to compensate it (par. 442¹).

Consequently, after examination of number of normative legal acts of the Republic of Poland regarding civil liability of police officers, the following conclusions can be drawn. Policemen are not responsible for damage done according to the Law «About the Police», but on the basis of the provisions of the Civil Code of the Republic of Poland, which regulate the issue of bringing public authorities and their officials to civil liability. Property damage is subject to reimbursement in any case, that is both direct damages and loss of profit should be compensated. In case of bodily injury or health disorder, compensation of damage shall include all expenses necessary for victim's treatment and his (her) following rehabilitation. If, as a result of the offense, the victim lost his (her) working ability completely or partially, his (her) needs increased or his (her) future prospects diminished, he (she) may demand an annuitant. At the same time, there is no lower and upper limit of the amount of compensation, it is determined separately in each case, depending

on circumstances of the case. Moral damage is compensated only in case of unlawful deprivation of liberty; in case of causation of harm by other legal or illegal police's actions the moral damage is not subject to reimbursement. The amount of compensation is not determined by law, but it should be sufficient to grade negative effects of the offense and to respond to the seriousness of the act.

We consider that some provisions on compensation for damage caused by the police of the Republic of Poland should be introduced into Ukrainian legislation. Thus, according to the Civil Code of Ukraine, the amount of income lost by an individual as a result of injury or other damage to his (her) health that should be compensated, is determined as a percentage of average monthly income that the victim has had before injury or other health damage. Meanwhile, when assigning with an annuity in the Republic of Poland, the amount of damage is calculated as the difference between what the victim could get if he (she) had not been inflicted and what he (she) would actually receive after the infliction. At the same time, the victim's income should be compared to the pay or its absence before the committed offense, but to that the claimant could earn if the offense did not occur. It would be sufficient if the victim will be able to prove the high possibility of receiving this income. Such a solution to this issue is very progressive, because if the person had not suffered from the offense, she would have been able to find better, more highly paid work, or perhaps this work had already been offered to her, and the victim had already been preparing for the transfer.

In addition, an annuity in the Republic of Poland is appointed not only in the event of injury or other damage to individual's health, as it is stipulated in Ukrainian's legislation, but also in case of increase of his (her) needs or a reduction of his (her) prospects for the future. This gives the victim an opportunity to get compensation for costs he (she) would not have undergone if he (she) had not suffered from the offense or to obtain what he (she) had been expecting if his (her) possibilities were not limited as a result of unlawful actions.

According to the Polish legislation, a person who has suffered as a result of policemen's unlawful actions, gets compensation both for direct losses and loss of profit. Although there is the principle of full reparation in Ukraine, however, according to the Law of Ukraine «About the procedure for compensation of damage caused to a citizen by unlawful actions of operative-investigative agencies, authorities of pre-trial investigation, prosecutor's office and court»,

the loss of profit is not subject to compensation. We believe this contradicts the practice of most European countries where are fixed rates of compensation for direct damage for unlawful imprisonment, which includes not only the amount of wage which the victim could get, but also a certain amount for reimbursement of loss of profit. For example, the court of the Republic of Poland may order the payment of a pecuniary damage at the rate from 2,000 zlotys (about 500 euros) to 20,000 zlotys (about 5,000 euros) [9].

REFERENCES

1. Kaparini, M., & Marenin, O. (Ed.). (2005). *Reformirovanie policii v stranah Centralnoi i Vostochnoi Evropy [Police's reformation in countries of the Central and Eastern Europe]*. Kyiv: Zadruga [in Russian].
2. Banchuk, O.A. (Eds.). (2013). *Status politsii: mizhnarodni standarty i zarubizhne zakonodavstvo [The status of the Police: international standards and foreign legislation]*. Kyiv: Moskalenko O.M. [in Ukrainian].
3. Konstytutsiia Respubliki Polshcha: vid 2 kvit. 1997 r. No. 78 [The Constitution of the Republic of Poland from April 2, 1997, No. 78]. (n.d.). *blog.vladey.com.ua*. Retrieved from <http://blog.vladey.com.ua/konstituciya-polsko%D1%97-respubliki ukra%D1%97nskoyu-movoyu/> [in Ukrainian].
4. Ustava z dnia 23 kwietnia 1964 r. *Kodeks cywilny (Dz.U. 1964 Nr 16 poz. 93)*. Retrieved from <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf>.
5. Szpunar Adam. (1998). *Odszkodowanie za szkodę majątkową: szkoda na mieniu i osobie*. Branta: Oficyna Wydaw.
6. Ewa Bagińska. (2015). *Developments in Personal Injury Law in Poland: Shaping the Compensatory Function of Tort Law*. Retrieved from <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1149&context=jcls>.
7. Yisra'el Gil'ad, Israel Gilead, Michael D. Green, Bjarte Askeland, Bernhard A. Koch. (2013). *Proportional Liability: Analytical and Comparative Perspectives*. Boston: Walter De Gruyter.
8. Evropeiskii sud po pravam cheloveka. Rukovodstvo po primeneniiu st. 5 Konvencii. Pravo na svobodu i lichnuiu neprikosnovennost [Guide on Art. 5 of the Convention. Right to liberty and security]. (n.d.). *www.echr.coe.int*. Retrieved from http://www.echr.coe.int/Documents/Guide_Art_5_RUS.pdf [in Russian].
9. Evropeiskaia komissiiia po effektivnosti pravosudiia. Otchet Sudebnye sistemy Evropy - izdanie 2014 g. (dannye 2012 g.): effektivnost i kachestvo sistemy pravosudiia [The report Judicial systems of Europe (2012 data): effectiveness and quality of the justice system]. (n.d.). *www.coe.int*. Retrieved from https://www.coe.int/T/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_ru.pdf [in Russian].

Стаття надійшла до редколегії 27.02.2018

Панченко О. І. – ад'юнкт кафедри цивільного права і процесу Національної академії внутрішніх справ, м. Київ

Цивільно-правова відповідальність поліцейських у Республіці Польща

Досліджено проблеми цивільно-правової відповідальності поліцейських за шкоду, завдану під час виконання ними службових обов'язків, у Республіці Польща. Розглянуто нормативно-правові акти, у яких закріплено підстави притягнення поліцейських до відповідальності, а також порядок визначення виду та розміру відшкодування завданої шкоди. Сформульовано пропозиції щодо можливості впровадження позитивного досвіду Республіки Польща із цього питання до законодавства України.

Ключові слова: цивільно-правова відповідальність, поліцейські, склад цивільного правопорушення, майнова шкода, ануїтет, моральна шкода, розмір відшкодування.