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HYPOTHETICAL CAUSATION (CAUSA SUPERVENIENS) IN MODERN COURT PRACTICE

1. Causation as the prerequisite of liability – introductory remarks

The Polish Civil Code in art 361 § 1 [kodeks cywilny, hereafter as c.c.] states that ‘a person obliged to pay damages shall only be liable for ordinary effects of an action or omission which the damage resulted from’¹. It is generally accepted that the given provision reflects a theory of adequate causation in Polish law. According to this theory the examination of causal connection comprises of two steps: the *conditio sine qua non* requirement and the examination of adequacy of the established connection.

In the comparative law literature the first element of causal inquiry, called in common law countries the ‘but-for test’, is increasingly often referred to as ‘natural causation’, although the natural causation test is often equalized with equivalence theory. The equivalence theory has not been accepted in Polish civil law as a sufficient premise of a liability claim, as opposed to criminal law. In the area of civil liability we do not deal with a purely cognitive determination what the general causes of a given event are, but we aim to determine if the damage ascertained is the result of a given event indicated by the injured, which triggers liability. The belief that the various theories of ‘adequate causation’ reflect but the idea of reasonable limitation of the scope of liability was widely established in case law and the following jurisprudence already in the forties.²

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¹ Translation: *Kodeks cywilny* (Civil code.). Tłumaczenie: T. Bil, A. Broniek, A. Cincio, M. Kielbasa (2011) 161.

² Art. 157 § 2 of the Code of Obligations (1933) stipulated that the person obliged to pay compensation is liable only for the normal effects of the act or omission from which the damage resulted. Hence,

Contemporary Polish court practice applies a classical formula of a cause-in-fact, which demands making a mental operation by asking a question if, without the given event, the result (damage) would have occurred. If the answer is that the result would have occurred anyway, there is no causal link. For example, in Appellate Court in Wrocław case of 23 February 2012³ the plaintiff claimed that due to a car accident she could not conceive a baby. Relying on an expert opinion, the Court said that there might be many reasons of inability to conceive a baby. Neither the plaintiff nor her husband attended any therapy, so it is impossible to establish what was the cause of their infertility and therefore the plaintiff failed to prove causal connection (*conditio sine qua non*).

On the other hand, if the answer to the factual causal question is negative, i.e. that without given event the result would not have happened, the natural causation is established. The negative conclusion directs us to the question of adequacy of that connection, which will not be discussed as such in this article.

A final introductory remark should consider the standard of proof of causation. In Polish civil procedure 'a probability bordering on certainty' is a traditional requirement. Over the past decades the standard of proof in personal injury cases has shifted from 'almost certainty' to 'sufficient degree of probability', with the approval of legal scholarship⁴. The shift has allowed the courts to award compensation in more complex scenarios involving this type of injuries. In contemporary practice, the courts typically state that the plaintiff has proved causation with a 'sufficient (sufficiently high) degree of probability'⁵. There are only subtle differences between the names given to the degree of probability. What is a 'sufficient degree' or a 'significant degree' of probability depends on an individual case.⁶ The courts emphasize that the certainty of causation cannot be required as concerns damage to health⁷. Moreover, doctrine strongly supports the concept of *prima facie* evidence used by the courts in cases of uncertain causation involving contracting contagious diseases.⁸

Below we discuss a number of typical situations involving the construct of hypothetical causation, which have been distinguished in comparative academic

the said provision established expressis verbis an adequate causation test. The letter of art. 157 § 2 was repeated with hardly any modification in art. 361 § 1 of the civil code. See T. Dybowski (in:) *System Prawa Cywilnego. Prawo Zobowiązań – część ogólna* [Civil law system. The Law of Obligations – general part (1981) 248, 253 ff. Contrary opinion was in minority: A. Ohanowicz, *Obligations. General Part* (1955) 35, advocated the theory of a necessary and accidental causal relationship.

³ I A Ca 67/12, not published.

⁴ See M. Nesterowicz, *Prawo medyczne* (9th edn 2010) 96 ff.

⁵ See the Supreme Court [hereafter SN] judgment of 17 June 1969, II CR 165/69, OSPiKA 7–8 (1969), *item* 155.

⁶ See SN judgment of 24 May 2005, V CK 654/04, not published.

⁷ Court of Appeal in Krakow judgment of 21 March 2000, I ACa 192/00, *Orzecznictwo Sadow Apelacyjnych* [Decisions of the Courts of Appeal] 3 (2002), *item* 1, SN judgment of 5 April 2012, II CSK 402/11, unpublished.

⁸ See M. Nesterowicz, *Medical Law* (8th ed. 2007), p. 62.

writings. We will neither analyse any legal theory of causation as such, nor discuss various concepts of causality on the ground of philosophy.⁹

2. The problem of hypothetical causation

The problem of hypothetical causation (also called supervening cause, *causa superveniens*, *überholende Kausalität*) relates to the situations of two superseding events: the first event caused damage (actual cause) and the second event would have caused the same damage had the first event not occurred (hypothetical cause). The question is whether the person liable for the actual cause can argue that the result would have happened anyway (*conditio sine qua non*), because the second event would have inevitably led to it.

In foreign legal systems, three general types of situations are considered in relation to hypothetical causation¹⁰: a) when it is an event for which someone else is liable, b) when it is a natural event, for which nobody is liable (hence, it is in the victim's sphere), and c) lawful alternative behaviour.¹¹ In all these cases it is acknowledged that the search for the cause-in-fact is in vain whenever two events in fact took place.¹²

An example of the first situation (a) is when an arsonist sets fire to the house (the actual cause), which burns half of the house. On the next day, another arsonist sets fire to the neighbouring house (hypothetical cause), which spreads and destroys the first house entirely. The second fire would anyway destroy the first house on the second day. In turn, a classic common-law example of the second situation (b) is the following: an arsonist sets fire to the house (actual cause). Few days later there is an earthquake (natural event), which would have anyway destroyed the whole house. May the arsonist (tortfeasor) be exempted from liability by arguing that without arson the house would have been destroyed anyway by another fire (the 'a' situation) or by an earthquake (the 'b' situation)? The third situation (c) is when a police officer arrests a suspect without an arrest warrant and in the subsequent lawsuit against the State the defence is raised that the competent court would have ordered the arrest.

Most jurisdictions tend to differentiate the solutions between the subgroups of cases. Since the Roman times the cases just addressed at a) are hotly debated.

⁹ See on causation theories: H.L.A. Hart, T. Honore, *Causation in the Law*, 2nd edn, Oxford 1985; J. Spier (ed.), *Unification of tort law: causation*, The Hague/London/Boston: Kluwer Law International 2000; R. Goldberg (ed.), *Perspectives on Causation*, Hart Publishing Oxford/Portland 2011; J. Hellner, *Causality and causation in law*, Scandinavian Studies in Law 2000, Vol 40; B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann (eds.), *Digest of European Tort Law. Vol I: Essential Cases on Natural Causation*, Vienna Springer 2007.

¹⁰ But in some systems it is not addressed, for example in France. See J-S Borghetti, France (in: H. Koziol (ed.) *Comparative stimulations for developing tort law*, Wien 2015, 209 ff.

¹¹ See B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann (eds.), *Digest of European Tort Law. Vol I: Essential Cases on Natural Causation*, Springer 2007, national reports in section 8.

¹² See B.A. Koch, Comparative report (in: *Essential Cases on Natural Causation*, p. 501.

Contemporary writings accentuate that these cases cannot be solved without complex considerations policy. In other words, the cases of supervening causal events breaking earlier hypothetical chains of causation pose a question of normative attribution rather than a natural causation question.¹³ This approach is reflected in part of modern European case law. The inquiry essentially is whether only the first causer, or the second one, should be held accountable for the damage, or both of them in part, or jointly and severally. The answers are not convergent at all¹⁴. In general, even if the 'competing cause' can be attributed to a third party, thus when all other conditions of liability of that party have been met, in most jurisdictions the first tortfeasor will still be liable. Hence, the first event only counts. From this angle; it is partially seen as the problem of unlawfulness of the first conduct, which must be sanctioned by a compensation claim.¹⁵ As H. Koziol suggests, if the first, real wrongdoer damages a legal good, then the hypothetical second tortfeasor no longer has any duties of care towards the said good and his conduct will not be unlawful.¹⁶

Some courts shift focus on the damage and damages by arguing that if a damage can be measured, a subsequent harmful influence on the victim's patrimony is to be disregarded, because it cannot change the calculation done at the moment when the damage was inflicted.¹⁷ This approach can be taken with respect to property damage, but it is less persuasive when personal injury is at stake, such as for example the loss of income due to the loss of earning capacity. There is also a specific situation when the first event did not take effects until the second event occurred¹⁸. The solution often argued suggests holding both tortfeasors jointly and severally liable, because both have completed activities that would have led to the infliction of the whole damage.¹⁹

The Principles of European Tort Law in art. 3:104 follow the prevailing approach. Hence, if an activity has definitely and irreversibly led the victim to suffer damage, a subsequent activity which alone would have caused the same damage is to be disregarded. A subsequent activity is nevertheless taken into consideration if it has led to additional or aggravated damage. Moreover, if the first activity has caused continuing damage and the subsequent activity later on also would have caused it, both activities are regarded as a cause of that continuing damage

¹³ See N. Jansen, *Historical report* (in:) *Essential Cases on Natural Causation*, p. 480–481.

¹⁴ See B.A. Koch, *Comparative report* (in:) *Essential Cases on Natural Causation*, pp. 501 ff.

¹⁵ See B.A. Koch, *ibidem*, p. 502, H. Koziol, *Basic questions of tort law from a germanic perspective*, Jan Sramek Verlag KG Wien, 2012, p. 163–168, M. Kaliński (in:) A. Olejniczak (ed.), *System prawa prywatnego*, Vol. 6, Warszawa 2014, p. 147, 152.

¹⁶ See H. Koziol, *Basic questions*, pp. 164.

¹⁷ Critically, convincingly B.A. Koch, *ibidem*, p. 502, H. Koziol, *Basic questions*, p. 163–168.

¹⁸ An example is given in the cited Digest when a horse is given deadly poison which only takes effect after one day, but before this time the horse is killed in a fire in the stable, p. 503.

¹⁹ See B.A. Koch, *ibidem*, p. 504.

from that time on. Consequently, in the latter case both tortfeasors will be held jointly and severally liable.

3. The solutions under Polish law

In contemporary Polish doctrine the problem of hypothetical causation is classified in various ways. According to a broad interpretation, it is not irrelevant whether hypothetical cause did in fact occur or not. If it did appear, then the causal scenario is based on the temporal succession of the events: the actual as a first and the hypothetical as a second one²⁰. According to a strict interpretation, the hypothetical event, to be so named, could never appear in reality²¹. The situations in the first group, when post factum we know that the second cause appeared, should be treated as a multiple (superseding) causes or, intervening causation scenarios, depending on factual circumstances²². In the second group, the hypothetical cause should always be disregarded.

The Polish legal doctrine does not give a uniform answer to the inquiry in the a) and b) situations mentioned above. According to the traditional and presently dominant opinion, which we share, a tortfeasor is principally not allowed to defend himself against a claim for damages by pointing at a hypothetical cause of damage²³. This means that generally a court should disregard the subsequent event that would have inflicted the harm anyway and should hold the first wrongdoer liable. However, the latter can be absolved from the obligation to compensate in two situations: 1) if the cause imputed to him had ceased to exist (in other words, had been completed) before the subsequent cause occurred; this view is supported by case law²⁴; 2) if the subsequent event intervened (ie influenced the state of the victim's patrimony) before the actual damage occurred.

The opposite standpoint, which has found some support in recent case law²⁵, suggests that the general rule should be reversed. However, according to this minority opinion clearly influenced by the Germanic legal theory, a supervening cause is not a matter of natural causation, but of evaluating damages.²⁶ Pursuant

²⁰ See B. Lewaszkiwicz-Petrykowska, *Wyrządzenie szkody przez kilka osób* (1978), p. 79; T. Dybowski, *System prawa cywilnego*, t. III, part 1 (1981), p. 262.

²¹ See J. Jastrzębski, *O wyprzedzającej przyczynowości*, *Kwartalnik Prawa Prywatnego* 3 (2003), s. 619–623; M. Kaliński, *Szkoda na mieniu i jej naprawienie* (2008), p. 410.

²² See J. Jastrzębski, *O wyprzedzającej...*, p. 619–623.

²³ See A Szpunar, *Ustalenie odszkodowania w prawie cywilnym* (1975), p. 43; W Czachórski, *Zobowiązania* (2003), p. 213 f; B Lewaszkiwicz-Petrykowska, *Wyrządzenie szkody...*, p. 79.

²⁴ SN judgment of 16 February 1965, I PR 330/64, OSN 11/1965, *item* 194. SN 28 February 1974, II PR 61/74, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych (OSPİKA)* 1974/9, *item* 195.

²⁵ SN judgment of 15 April 2010, II CSK 544/09, *Orzecznictwo Sądu Najwyższego Izba Cywilna – Zbiór Dodatkowy* (Decisions of the Supreme Court Civil Chamber – Supplementary Collection, OSNC-ZD) D/2010, *item* 113, SN 29 April 2010, IV CSK 467/09, OSNC-ZD D/2010, *item* 116, both decisions reported in E. Bagińska, Poland (in:) H Koziol/BC Steininger (eds), *European Tort Law 2010* (2011) 451, nos 20–27 and nos 28–38, respectively.

²⁶ See M. Kaliński, *System*, p. 147; J. Jastrzębski, *O wyprzedzającej...*, p. 612 ff.

to that view, from the theory of difference (*Differenztheorie*) follows the necessity to take account of certain hypothetical causes when assessing the damage. Hence, if a hypothetical state of the victim's patrimony is one of the factors taken into account in the assessment of the loss, then all the circumstances subsequent to the tortious event that might or have influenced this state should be considered. A supervening cause belongs to those 'circumstances'. However, in two situations a court should have competence to disregard the hypothetical cause. The first exception is when a third person would be liable for that cause, whether in contract or in tort. The second exception is made as regards so-called 'alternative legal conduct of the tortfeasor', which is to be disregarded when the loss suffered is of the kind that remains within the ambit of protection of the legal rules that were broken.

The first decision that applied this newer approach was a case of 14 January 2005, III CK 193/04²⁷. The Court allowed a supervening cause to be taken into consideration for the purpose of assessing property losses. In that case, however, the final result would have been the same had the dominant (albeit opposite) doctrinal approach been applied. The case considered lawful alternative behaviour (see the discussion below), but the Court has established the general conditions that should be met in order to plead a supervening cause:

- Firstly, the supervening cause has to form a part of a parallel, hypothetically built chain of events, independent of the actual sequence of events. A supervening cause should not be taken into account when it was somewhat dependent or triggered by the actual cause. A hypothetical cause must be an event that has been prevented from happening by the first, independent event.
- Secondly, the defendant has to prove with a degree of probability bordering certainty that such a hypothetical cause would have necessarily happened. However, necessity of the successive event is not to be identified or inferred from its irreversibility.

Hence, a prevailing rule in modern Polish case law seems to proclaim that the supervening cause does not influence the establishment of the defendant's liability, but it may in certain cases, subject to the court's assessment of policy considerations, be taken into account for the purpose of calculating the extent of property losses. Given that the defendant has proven with certainty that a hypothetical cause would have happened, the consideration of that cause means that it may be regarded as an element of the process of establishing the hypothetical state of the victim's patrimony. Limitations to its application flow from policy arguments, functional interpretations as well as from evidential uncertainty (of the hypothetical course of events).²⁸ Thus, in a way, a supervening cause interferes with the theory of adequacy, which also plays the role of limiting the scope of liability.

²⁷ OSP 7-8/2006, *item* 89, reported in E Bagińska, Poland (in:): H Koziol/BC Steininger (eds), *European Tort Law 2006* (2008) 373, nos 5–12.

²⁸ SN (panel of 7 judges) judgment of 22 January 2013, I CSK 401/11, OSNC 9/2013, *item* 110, reported

A recent example of a case where the Supreme Court confirmed the (potential) relevance of *causa superveniens* is a decision of 9 September 2011.²⁹ On the facts, a woman was employed in a discount supermarket where safety regulations were breached. She was forced i.a. to lift heavy packages with products (10-20 kilograms) and put them on high shelves (up to 2 meters). At one occasion the plaintiff while lifting a package felt pain in her arm and got injured. Later on her health condition deteriorated and she became temporarily unable to work. The employer alleged the lack of a natural causal link between the working conditions and the lack of working capacity, arguing that the plaintiff suffered from an autonomous illness that would have led to her disability anyway. The Supreme Court ruled that, in principle, *causa superveniens* might have an impact on the assessment of the extent of damage; however, a hypothetical cause has to be proven with certainty. In the presented case it was not certain whether, absent the overloading incident, the plaintiff would have suffered from an autonomous illness to the extent that made her entirely incapable to work and therefore the employer's cassation to the Supreme Court was overruled. This case shows, that similarly to the solutions accepted in other legal systems, the problem of continuous damage (in cases of personal injury – the loss of income due to the loss of earning capacity) is rather solved in favour of the victim. The existing solutions either disregard the second event (especially in so called pre-disposition cases³⁰) or impose joint and several liability when the second event does not lie in the victim's sphere, but triggers the liability of a third person³¹.

4. Lawful alternative conduct

The third situation (c), i.e. lawful alternative behaviour, is increasingly often discussed in Polish jurisprudence. Some writers consider it to be a specific question of hypothetical causation and apparently this is also the way the Supreme Court approaches the issue. The problem of a lawful alternative behavior is a situation where there occurred – in fact – only one unlawful event which has caused damage (actual cause). However, there is certainty that had that event (conduct, activity) been lawful, it would have caused the same damage. The question hence arises, whether the defendant may allege, in order to be exempted from liability, that had he behaved lawfully, the damage would have happened anyway. This inquiry is more problematic than the previous examples of hypothetical causation, because the argument that the defendant can exclude his liability by point-

in E Bagińska/I Adrych-Brzezińska, Poland (in:): H Koziol/BC Steininger (eds), *European Tort Law* 2013 (2014) 485, nos 11–24.

²⁹ III PK 4/11, LEX no 1119709.

³⁰ See K Krupa-Lipińska, *Wpływ szczególnych predyspozycji organizmu poszkodowanego na odpowiedzialność za szkodę*, „Prawo i Medycyna” 2/2014, pp. 43–66.

³¹ See SN 16 February 1965, I PR 330/64, OSN 11/1965, item 194, See B.A. Koch, *Comparative report...*, p. 528.

ing to a lawful alternative conduct may undermine legal provisions that were introduced to protect against certain type of damage.

Diverse views found in European doctrine are also represented in the Polish legal academic writings. Some authors refuse to take alternative legal conduct into consideration³², while others confirm its relevance and emphasize that the problem is much more complicated than in classical *causa superveniens* scenario. In particular, they formulate numerous exceptions, one of which is a situation where the damage is of a type that the given norms were created to protect against³³.

There are certain areas of court practice where this issue is particularly visible, i.e. in the execution cases, in cases concerning patient's informed consent for medical intervention and in cases of State liability for illegal expropriation.

As regards the execution of judgments cases, a decision of the Supreme Court of 14 January 2005³⁴ should be recalled. On the facts, the plaintiff took three credits (A, B and C) in the defendant's bank, but he did not pay off any of them. The bank therefore issued enforcement titles on all three credits, however, only the title to credit C got a court enforcement clause. After having executed credit C and upon bank's request the bailiff continued execution on credits A and B. The Court considered whether the bank could argue that had the bailiff not continued execution on credits A and B, the bank could have been able to obtain a court enforcement clause on the remaining credits and could have performed execution lawfully. On a general note, the Court would have permitted a supervening cause to be taken into account for the purpose of assessing the extent of property losses. By way of exception, however, it should be disregarded where the damaging conduct of the defendant violated the legal norms aiming to prevent the plaintiff's damage. The protective function of those norms would otherwise be undermined.³⁵

More complex are cases of patient's consent for medical intervention. The question arising here is whether a doctor can argue that a patient would have agreed to a medical intervention, had he been informed or properly informed about its possible effects.

Before answering this question we have to make two observations. First, that the given dispute is only relevant when pecuniary damage and/or non-pecuniary damage stems from a medical intervention, but not from the sole infringement of the patient's right to the informed consent. The latter is protected by art. 16 in conjunction with art. 4.1 of Patient's Rights and Patient's Ombudsman Act of 6 November 2008. Under this Act a doctor is liable for the infringement of a patient

³² See M. Nesterowicz, *Glosa do orz. z 11 marca 2008 r. I ACa 846/07, „Przegląd Sądowy”* 11–12 (2009), p. 224–225; M. Świdorska, *Zgoda pacjenta na zabieg medyczny* (2007), p. 148–152.

³³ See J. Jastrzębski, *Glosa do orzeczenia z 14 stycznia 2005 r., III CK 193/04, OSP* 7-8 (2006), p. 421; J. Jastrzębski, *O wyprzedzającej...*, p. 645.

³⁴ III CK 193/04, OSP 7-8/2006, *item* 89, reported in E Bagińska, Poland (in:) H Koziol/BC Steininger (eds), *European Tort Law 2006* (2008) 373, nos 5–12.

³⁵ Similarly, see H. Koziol, *Basic questions...*, p. 278.

right to informed consent regardless of whether the patient would have agreed to the intervention at issue. Second, serious evidentiary problems arise for the patient to prove which decision he would have made, had he be properly informed. Polish legal authorities argue that it is not necessary to prove with certainty that the patient would have agreed to an intervention, but that in a normal course of events his or her consent could not be doubted. Following Germanic legal doctrine, it is also suggested that a standard of a “reasonable patient” who would agree for a certain intervention be implemented. In a discussed case scenario, a patient might have raised counter-arguments related, for example, to his or her religion or other subjective factors. Doubts about a hypothetical course of events would burden the tortfeasor³⁶.

A common element in Polish medical malpractice cases is that a given medical intervention was necessary to save the patient’s life and that the outcomes, which had materialised and about which patient had not been properly informed, were rare and depended upon an individual reaction to the intervention. Unfortunately, the case law is not firm and one may find cases in which a court has considered the hypothetical consent of the patient as a circumstance absolving the doctor from liability³⁷, as well as cases where this hypothetical consent was deemed irrelevant³⁸. An example of the former line of cases is the Supreme Court judgment of 21 May 2003³⁹. A woman who went for a surgery of thyroid (which was performed *lege artis*) suffered partial paresis of a right vocal cord. An operation was necessary to remove risk to her life. The patient was informed about typical possible effects of an operation and agreed on it. The partial paresis of a vocal cord is a rare outcome of this type of surgery (3-5%) and is dependant on individual body reaction, which is hard to predict. The Supreme Court rejected her claim arguing both that the behaviour of the doctor was not unlawful and that there was no causal link between the lack of information about untypical outcomes of such operation and the given effect, because the reason for her consent for an operation was the fact that her life was in danger and was not dependent upon knowledge about untypical possible consequences of an operation.

Hypothetical causation and legal alternative behaviour are almost always invoked as a defence in cases of illegal, historical expropriations. In Poland, the nullification of many of the expropriating decisions took place only after 1990. Hundreds of plaintiffs still pursue claims for damages. As regards historical harms (illegal nationalisation or expropriation decisions without compensation), the Supreme Court has appeared to stabilise its approach. It has held the view

³⁶ See W. Borysiak, *Glosa do wyroku Sądu Najwyższego – Izba Cywilna z 26 kwietnia 2007 r.*, II CSK 2/07, OSP 2 (2011), *item* 16, p. 99–102.

³⁷ See SN judgment of 21 May 2003, IV CKN 168/01, LEX nr 371779; SN 26 June 2007, II CSK 2/07, OSP 1/2009.

³⁸ See District Court in Krakow judgment of 30 December 2003, I C 110/02, “Prawo i Medycyna” 1 (2006), p. 116 with cmt M. Nesterowicz; SA in Warsaw 11 March 2008, I Aca 846/07, not published.

³⁹ IV CKN 168/01, LEX no 371779.

that, given that the defendant has met the burden and the standard of proof of a supervening cause (ie certainty, inevitability), the cause does not influence the establishment of his liability, but it influences the extent of the damage and the amount of damages. However, the Court has put limits to the defence of inevitable (inescapable) expropriation, thereby giving preference to the protection of the interests of the victims. In the judgment of the panel of 7 judges of 22 January 2013 the Supreme Court confirmed the newer approach, which accepts the defence of a supervening (hypothetical) cause. Notwithstanding this general rule, the Court distinguished cases where the hypothetical cause, raised as a defence by the State Treasury, is a hypothetical expropriation of a proprietary right to land. The Court underlined that the wrongs committed by the socialist government after World War II in execution of nationalisation decrees that had accommodated the interests of former owners by guaranteeing them a right to be compensated were intentional. Such conduct not only breached the protective scope of the said provisions, but was also a method to avoid formal procedures in which the interests of former owners and their procedural rights would have had to be respected. The final result of such procedures was unpredictable to the authorities. Therefore, the fact that a piece of land would have been legally expropriated has no impact on the amount of damages sought in connection with an administrative decision denying a right of a temporary ownership of that land that was issued in patent violation of the law.⁴⁰ The decision, which we approve of, thus sends a clear signal that such a defence is neither a proper way to avoid liability by the State, nor a simple method to reduce damages by a hypothetical sum of compensation for expropriation that had never been calculated, nor paid by an administrative organ.

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PRZYCZYNOWOŚĆ HIPOTETYCZNA (*CAUSA SUPERVENIENS*) W ŚWIETLE WSPÓŁCZESNEJ JUDYKATURY

Przedmiotem rozważań jest przyczynowość hipotetyczna bądź tzw. *causa superveniens*. Jest to sytuacja faktyczna, w której dwa następujące po sobie zdarzenia mogą być rozpatrywane jako przyczyna szkody; pierwsze zdarzenie szkodę spowodowało, zaś drugie spowodowałoby ją gdyby nie zaistnienie pierwszego zdarzenia. Podstawowe pytanie badawcze dotyczy tego, czy osoba odpowiedzialna za przyczynę rzeczywistą może podnosić, że rezultat w postaci szkody zdarzyłby się nawet bez zdarzenia, za którą odpowiada. Artykuł prezentuje polskie i europejskie orzecznictwo oraz poglądy doktryny

⁴⁰ On the basis of art 7 of the Decree of 26 October 1945 on ownership and use of real estate in the city of Warsaw.