Annuals of the Administration and Law no. 17 (2), p. 341-359

Review article

Received: **16.07.2017**
Accepted: **25.10.2017**
Published: **20.12.2017**

The fundingsources for the publication: **author's own resources**

Author's Contribution:
(A) Study Design
(B) **Data Collection**
(C) Statistical Analysis
(D) **Data Interpretation**
(E) Manuscript Preparation
(F) **Literature Search**

Magdalena Sobas*

LIABILITY FOR PRENATAL INJURIES IN THE CONTEXT OF THE PROTECTION OF THE RIGHTS OF CONCEIVED CHILDREN

INTRODUCTION

Man as a creature standing at the highest level of evolutionary development has been subject to special protection, including legal protection. The Constitution of the Republic of Poland of 2 April 1997[1] in Art. 30 as a source of freedom and human and civil rights, indicates the inherent and inalienable dignity of a person who is subject to the obligatory protection of public authorities. Dignity, therefore, becomes an element defining a human being, which is the foundation of all further privileges. The right to life, defined in Art. 38 of the Basic Law, and, consequently, the right to health protection guaranteed in Art. 68 of the Constitution, are inseparably connected with dignity. Consequently, the Constitution, in Art. 38, contains a kind of a programmatic norm oriented towards undertaking activities, including all legislative activities aimed at protection of life[2]regardless of the social, property, family or even health situation in which an individual is[3].

* PhD student at the Department of Civil Law and Private Law of the International Faculty of Law and Administration at the University of Silesia in Katowice.

1 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 2009, No. 114, item 946.

2 B. Banaszak, M. Jabłoński, *Teza 2 do art. 38* [in:] *Konstytucje Rzeczypospolitej Polskiej oraz komentarz do Konstytucji RP z 1997 roku*, edited by J. Bocia, Wrocław 1998, p. 78.

3 P. Kuczma, *Prawna ochrona życia* [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, edited by M. Jabłońskiego, Wrocław 2014, p. 34.

The legal analysis concerning human life, and thus the moment from which the onset of its existence should be assumed, is inseparably connected with considerations of philosophical, ethical, bioethical or even moral nature. This problem is constantly returning in the social, scientific and legal discourse[4]. Because of the lack of terms to facilitate its interpretation[5] the edition of the provision of Art. 38 of the Constitutionopened the door for its instance by means of statutory provisions[6], and thus for numerous interpretation arguments connected primarily with the duration of the human life, its beginning and end. It is assumed, however, that the protection of existence refers to the full, complete period of human life, to each of its stages and phases[7].

In connection with such an interpretation of human life, it is possible that a child may demand compensation for damage suffered before birth, which is inseparably connected with the right to life, and also with the possibility of conducting appropriate diagnostics already in the prenatal phase being within the scope of the right to health protection[8].

THE RELATIONSHIP BETWEEN THE RIGHT TO LIFE AND THE RIGHT TO HEALTH PROTECTION IN RELATION TO ACONCEIVED CHILD

As already mentioned in the introduction, the Constitution of the Republic of Poland provides everyone with the right to life as well as health protection. In addition, according to the will of the legislator, children, people with disabilities, the elderly, and pregnant women are included in the special protection of public authorities[9]. As J. Haberko points out, despite the fact that it is not clear from the literal wording of the provision thatthe protection also includes a conceived child, it was the legislator's goal to provide the care not only of a pregnant woman, who as the subject of the law has, e.g. the right to health services, but also of the foetus developing in her body[10], whose subjectivity is not always obvious, as discussed later in the text.

A. Zoll emphasizes that between the provisions of Art. 38 of the Constitution guaranteeing the right to life, and Art. 68 para. 1 of the Constitution, there is a strong connection, and these principles should be interpreted together[11]. On the other hand, the norm of Art. 38 covers all human beings from conception

[4] E. Zielińska, *Konstytucyjna ochrona prawa do życia od momentu poczęcia (uwagi krytyczne do projektu zmiany art. 38 Konstytucji),* „Państwo i Prawo" 3/2007, p. 5.

[5] R. Sztychmiler, *Konstytucyjna ochrona życia ludzkiego*, „Przegląd Prawa Wyznaniowego" v. 5 (2013), p. 110.

[6] R. Grabowski, *Prawo do ochrony życia w polskim prawie konstytucyjnym*, Rzeszów 2006, pp. 212-213.

[7] P. Kardas, T. Sroka, W. Wróbel, *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, t. III, WKP 2012, LEX no. 156000.

[8] This subject is extremely extensive, therefore only selected aspects will be included for the purposes of this study.

[9] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Warszawa 2000, p. 92.

[10] Haberko J., *Cywilnoprawna ochrona dziecka poczętego, a stosowanie procedur medycznych*, Oficyna 2010, LEX no. 114901

[11] A. Zoll, *Problemy służby zdrowia w świetle doświadczeń RPO*, Prawo i Medycyna, no. 8, 2000, p. 8.

to death[12]. This stance was also emphasized by the Constitutional Tribunal in a ruling of 28 May 1997[13], which stated that „due to the role of motherhood, the constitutional protection of the human life as a value is not undertaken solely in the interest of the mother.The foetus and its proper development is an equal subject of this protection. This obviously covers the health of the conceived child and the prohibition of causing health disorders or foetal injury."The Tribunal also stressed that protection of life at the foetal stage was also ensured in Art. 24 of the Convention on the Rights of the Child[14], where it was decided that States-Parties recognize the right of the child to the highest possible level of health and facilities for the treatment of diseases and health rehabilitation, will seek to ensure that no child is deprived of the right to access to this type of health care and, in particular, take the necessary steps to provide mothers with proper health care before and after the birth of the child.In addition, the legislator, in Art. 1 and 2 of the Law of 7 January 1993 on family planning, protection of the human foetus and conditions for the admissibility of termination of pregnancy[15]stated unequivocally that the right to life is protected, including in the prenatal phase.

In connection with the above, pregnant women have been subject to special protection expressed in statutory provisions, which refers to, inter alia, prenatal diagnostics.

Extremely dynamic development of science and technology in recent years has led to the expansion of methods used in prenatal diagnostics[16]. These methods allow for the diagnostics and possible treatment of defects already at the foetal stage of life[17]. Prenatal tests are part of the widely understood prenatal care, and the term refers to all diagnostic procedures aimed at verifying the state of health and the degree of foetal development[18]. The legislator in the Act of 27 August 2004 on health care services financed from public funds[19] explicitly indicated that prenatal tests (including those recommended in risk groups and in women over 40 years of age) are benefits for maintaining health, preventing diseases and their early detection.

In the vast majority of cases, prenatal tests are minimized only for non-invasive diagnostics, however, sometimes in the face of doubts about the state of health of a conceived child, they are not sufficient, and therefore there are indications for invasive prenatal tests (trophoblast villus biopsy, amniocentesis, cordo-

[12] Ibidem.

[13] Ruling of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK ZU 1997, no. 2 item 19.

[14] Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws of 1991 No. 120, item 526).

[15] The Act of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws 2001, No. 154, item 1792), see Art. 1 and 2.

[16] A. Stembalska, A. Nomejko, K. Pesz, *Poradnictwo prenatalne – diagnostyka prenatalna inwazyjna*, Perinatologia , Neonatologia i Ginekologia, vol. 5, book 2, 2012, p. 100.

[17] Ibidem.

[18] K. Więckiewicz, *Czy w Polsce istnieje prawo kobiety do badań prenatalnych?*, Prawo i Medycyna, 4/2011 (45, vol. 13), p. 94.

[19] Act of 27 August 2004 on health care services financed from public funds (Journal of Laws of 2017, item 1938), see Art. 27 sec. 1 point 5.

centesis, foetoscopy[20])[21]. These tests are subject to the risk of complications and even loss of pregnancy[22].

Advances in prenatal tests have contributed to the understanding of the foetus in terms of a patient who is entitled to certain health services and even treatment at the foetal stage[23]. Despite the fact that the fundamental principle of prenatal diagnostics should be the well-being of the mother, as well as the conceived child, expressed in the right to the protection of life, health and dignity[24], one cannot overlook the fact that diagnostic actions, and thus possible rescue or improvement of the condition of the foetal health cannot take place without specific interference in the mother's body, which can often be fraught with risk[25].

According to Art. 38 of the Code of Medical Ethics[26], the doctor is obliged to familiarize patients with the possibilities of modern medical genetics, as well as diagnostics and pre-birth therapy, while providing the above information, the physician is obliged to inform about the risks associated with conducting pre-birth tests. Additionally, while taking medical action in pregnant women, the doctor is simultaneously responsible for the health and life of her child, and his duty is to preserve the health and life of the child before birth[27]. Thus, the Code of Medical Ethics obliges the doctor not only to perform appropriate prenatal diagnostics, but also to inform parents about the state of health of the foetus[28]. In addition, prenatal care obligations, including information obligations, rest not only on the physician, but also on the government and local government administration bodies. These bodies are obliged to provide pregnant women with medical, social and legal care, in particular through prenatal care and pregnancy care, as well as to ensure free access to information and prenatal testing, especially when there is an increased risk or suspicion of a genetic or developmental defect of the foetus or an incurable disease threatening the life of the foetus[29].

In the case of prenatal tests in relation to the liability for damage suffered before birth pursuant to Art. 446[1]of the Civil Code,the main emphasis is placed on the situations where the doctor did not detect a defect in the fetus during the examination, and thus deprived it of the possibility of preventing its development

[20] D.C. Wertz, J.L. Fletcher, K. Berg, *Review of Ethical Issues in Medical Genetics. Report of Consultants to WHO*, WHO/HGN/ETH/00.4, 2003, p.62.

[21] Ibidem, p. 101.

[22] Ibidem.

[23] P. Frączek, M. Jabłońska, J. Pawlikowski, *Medyczne, etyczne, prawne i społeczne apeksty badań prenatalnych w Polsce*, Medycyna Ogólna i Nauki o Zdrowiu, vol. 19, book 2, 2013, p. 103, see E. Syweńki, D. Suchańska, D. Dobrowolska, Płód jako pacjent-rys historyczny, Perinatologia, Neonatologia i Ginekologia. 1(4): 3, 2008, s. 14-31; J. Łuczak-Wawrzyniak, J. Skrzypczak, M. Rajewski, *Perinatal palliative care – ethical and moral challenge of XXI century*, Arch. Perinat. Med. 12(2), 2006, p. 41-43.

[24] Ibidem, p. 105.

[25] Haberko J., *Cywilnoprawna*...

[26] Code of Medical Ethics dated 2 January 2004 (unified text consolidated text; containing amendments adopted on 20 September 2003 by the Extraordinary 7th National Congress of Physicians), http://www.nil.org.pl/__data/assets/pdf_file/0003/4764/Kodeks-Etyki-Lekarskiej.pdf [access: 28.11.2017].

[27] Ibidem, Art. 39.

[28] P. Frączek, M. Jabłońska, J. Pawlikowski, *Medyczne*..., p. 105.

[29] Law of 7 January 1993 on family planning, protection of the human fetus and conditions of acceptability of termination of pregnancy (Journal of Laws of 2001, No. 154, item 1792), see Art. 2.

or even curing in the prenatal phase, did not satisfy the information obligation in relation to the child's parents about its state of health or did not refer the pregnant woman to detailed pre-natal tests (e.g. in fear of a possible abortion[30]), or even if the child has suffered damage as a result of invasive prenatal tests.

DAMAGE SUFFERED BEFORE BIRTH

In the Polish civil law, the basis for pursuing claims for prenatal damage (the so called*prenatal injuries*) is Art. 446[1] of the Law of 23 April 1964 of the Civil Code (further referred to as CC)[31], in which the legislator grants the born child the opportunity to demand compensation for damage suffered even before it was born[32]. Admittedly, this provision refers directly to a child that is already born, but it is also a guideline to the protection of the life and health of the conceived child[33].

The problem of liability for prenatal injuries is often erroneously connected with the so called*wrongful life* (bad life), *wrong ful birth* (bad birth), or even-*wrongful conception* (unexpected conception, bad conception)[34].

WRONGFUL CONCEPTION, WRONGFUL BIRTH AND WRONGFUL LIFE

*Wrongful life*is a very controversial issue[35]. It is often explained as an "unlawful cause of life"[36]. It covers claims for damages to a child that was born with physical or mental defects[37]. This is an action against a doctor or hospital, which is a consequence of incorrectly provided preconception or prenatal advice, which closed the parents of the child the way to decide on actions aimed at preventing the conception and birth of a child[38]. At the same time, the birth of such a child, and thus its existence with disability, is the cause of its pain and suffering, requiring compensation, and he thinks that it would be better if such a person was not born at all[39]. In the event of *wrongful life* the claim may be addressed even against the child's mother[40].

---

[30] J. Łuczak – Wawrzyniak, *Diagnostyka prenatalna – analiza celu badania z perspektywy lekarza, matki/ rodziców, płodu/dziecka*, Perinatologia, Neonatologia i Ginekologia, vol. 6, book. 1, 2013, p. 8.

[31] Law of 23 April 1964 of the Civil Code, Journal of Laws 2017, item 1132.

[32] J. Haberko, *Wyrządzenie szkody prenatalnej w kontekście zdolności prawnej dziecka poczętego* [in:] *Czyny niedozwolone w prawie polskim i prawie porównawczym*, *Materiały IV Ogólnopolskiego Zjazdu Cywilistów*, pod red. M. Nesterowicza, Warszawa 2012, p. 163.

[33] Ibidem.

[34] T. Justyński, *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Zakamycze 2013, LEX no. 40218.

[35] W. Sitek, *Zadośćuczynienie w sprawach wrongful life w świetle prawa polskiego*, „Państwo i Prawo" 8/2010, p. 96.

[36] T. Justyński, *Poczęcie...*, p. 3.

[37] M. Bilecka, *Proces o „zle urodzenie" (Uwagi do wyroków Sądu Okręgowego w Łomży oraz Sądu Apelacyjnego w Białymstoku),* „Prawo i Medycyna" no. 3/2005,p. 42.

[38] M. Soniewiecka, *Regulacje prawne wobec rozwoju nowoczesnych technik kontroli prokreacji: analiza roszczenia wrongful life*, „Diametros" no. 19 (marzec 2009): 137 – 159, p. 137.

[39] W. Sitek, *Zadośćuczynienie w sprawach wrongful life w świetle prawa polskiego*, „Państwo i Prawo" 8/2010, p. 96.

[40] Quoted following M. Soniewiecka, *Regulacje*..., p. 140 (M. Shaw, Conditional Prospective Rights of the Fetus, 5 J. Legal Med. 63, 111 (1984), after: Botkin [2002] p. 272).

The terms*wrong ful conception (wrongful conception actions, wrongful pregnancy actions*[41]*)* and *wrongful birth (wrongful birth action*[42]*)* cover situations, in which a woman and a man (parents) did not want the conception of the baby at all, or they did not want to give birth to a handicapped child, which occurred as a result of culpable action of a doctor[43]. In the case of *wrongful birth*t he basis for claim is the same as in the case of *wrongfullife*, however, the parents of a handicapped child are entitled to it and it is directed at the doctor or medical staff in relation to depriving the parents of the possibility of taking a decision on abortion in a situation when it was possible to detect or predict a serious damage to the foetus[44]. However, when it comes to the *wrongful conception* claim,the parents of a child are entitled to it, and the range of subjects against whom it is madeis exactly the same as in the case of*wrongful birth* (most frequently the defendant is the hospital, another person from the medical staff or even a pharmacist), but with the difference that it is based on the conception of a healthy but unwanted child[45] (it would not have been possible to conceive a child without the defendant's wrongdoing)[46]. Thus, the issues related to *wrongful conception* are usually connected with unsuccessful sterilization, incorrectly performed abortion or improper contraception, while the birth of a child with a defect is not a fundamental premise of making a claim[47].

LIABILITY FOR PRENATAL DAMAGE (THE SO CALLED PRENATAL INJURIES)

In the case of the liability for prenatal damage pursuant to Art. 446[1]of the Civil Code, the legislator assumed the concept, according to whicheven before the man comes into the world, it is possible to cause damage resulting from the actions of certain people[48]. This provision was introduced into the Civil Code by Art. 6 point 2 of the Law of 7 January 1993 on family planning, protection of the human foetus and conditions for the admissibility of termination of pregnancy[49], but, its wording was clarified through Art. 2 of the Law of 4 December 1996 amending the law on family planning, protection of the human foetus and conditions of acceptability of termination of pregnancy[50] by adding the objection that the child can not pursue these claims against the mother, which then was deleted

[41] Określenia te zostały użyte w orzeczeniach w sprawach: Coleman v. Garisson (327 Atlantic Report 2d. 757, Delaware 1974) and Bushman v. Burns Clinic Medical Center (268 Northwestern Report 2d. 683, Michigan 1978), T. Justyński, *Poczęcie...*, p. 20.

[42] T. Justyński, *Poczęcie*...., p. 20.

[43] Ibidem, pp. 15-21, 23.

[44] M. Soniewiecka, *Regulacje*..., p. 138 (ref. e.g. the lack of prenatal tests in the case when they are indicated).

[45] Ibidem (refers e.g. improperly performer abortion).

[46] T. Justyński, *Glosa do wyroku Sądu Apelacyjnego w Białymstoku, I Wydział Cywilny z dnia 4 lipca 2008 r., I AcA 278/08*, „Prawo i Medycyna" 2009, no. 4 (37, vol. 11), p. 131.

[47] Ibidem, p. 21.

[48] J. Haberko, *Wyrządzenie*..., p. 163.

[49] Law of 7 January 1993 on family planning,protection of the human fetus and conditions of admissibility of termination of pregnancy, Journal of Laws 1993, No. 17, item 78.

[50] The Law of 4 December 1996 amending the act on family planning, protection of the human fetus and the conditions for the admissibility of termination of pregnancy, Journal of Laws 1996, No. 139, item 646.

from the abovementioned provision as a result of the ruling of the Constitutional Tribunal[51].

The conviction that the child could lodge claims for damage suffered during the prenatal life functioned in the legal thought long before the amendment of the Civil Code in the scope of the provision of Art. 446[1] of the Civil Code. Already in 1965, the Supreme Court[52] considering a case involving a child who was born with the cleft lip, upper jaw and palate due to an improperly performed abortion (the doctor incorrectly did not recognize the multiple pregnancy, as a result of which he removed only one foetus while damaging the other) stated that the child had the right to pursue claims for damages in connection with the bodily injury or health disorder, even if the act causing the damage occurred before birth and referred directly to the child's pregnant mother.

The legislator therefore extended the legal protection of the conceived child, which together with the regulations contained in other provisions of the Civil Code, as well as the Family and Guardianship Code[53] creates a compact system of the child's unique legal situation[54].

THE ESSENCE OF PRENATAL DAMAGE AND THE PRINCIPLE OF LIABILITY

The type of damage sustained by a child in the prenatal stage is not strictly defined[55]. As T. Justyński indicates, this damage is narrowly understood as an injury to healthof the *nasciturus*done by the doctor, medical personnel or other subject[56], and may be connected with, among others,not starting the treatment, taking the wrong treatment, making the wrong diagnosis, performing the procedure in a way that is incompatible with the principles of art and the level of medical knowledge, or even using the wrong treatment with pharmacological agents[57]. These actions may have a negative effect in the form of a bodily injury or harm related to the health of the child, both in the pre-natal phase and after the birth of the child, if it is born live[58].

Prenatal damage often refers to circumstances occurring during pregnancy, both in the form of actions and omissions (e.g. mother's refusal to undergo treat-

[51] Announcement of the President of the Constitutional Tribunal of 18 December 1997 on the loss of binding force Art. 1 point 2, Art. 1 point 5, Art. 2 point 2, Art. 3 point 1 and Art. 3 point 4 of the Law on amending the law on family planning, protection of the human fetus and conditions of admissibility of termination of pregnancy and on amending some other laws, Journal of Laws 1997, No. 157, item 1040.

[52] Judgement of the Supreme Court of 8 January 1965, II CR 2/65, OSPiKA 1967, book 9, item 220 with glossby A. Szpunar.

[53] Law of 25 February 1964 Family and Guardianship Code, Journal of Laws 2017, item 682.

[54] J. Haberko, *Komentarz do art. 446[1] Kodeksu cywilnego* [in:] *Kodeks cywilny. Tom I. Komentarz Art. 1-449[11]*, pod red. M. Gutowskiego, Warszawa 2016, p. 1861.

[55] T. Justyński, *Poczęcie*....,

[56] Ibidem.

[57] K. Michałowska, *Artykuł 446[1] k.c. jako podstawa dochodzenia roszczeń z tytułu szeroko rozumianych szkód prenatalnych powstałych w wyniku działań medycznych* [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, edited by L. Ogiegło, W. Popiołka, M. Szpunara, Kraków 2005, p. 1190.

[58] Ibidem, s. 1182, L. K. Paprzycki, *Granice prawnokarnej ochrony zycia i zdrowia człowieka na tle orzecznictwa Sądu Najwyższego w latach 2006-2010*, „Medyczna Wokanda" 2010, no. 2, pp. 5-13.

ment during pregnancy, foetal alcohol syndrome FAS[59],or neonatal abstinence syndrome NAS, infecting the pregnant woman with an infectious disease or other disease causing the foetal defect, transfusion of incorrect blood group or mechanical injury[60], and sometimes even non-detection of a defect that could be cured in the prenatal stage or shortly after birth). It has to be stressed, however, that Art. 446^1 of the Civil Code does not cover the treatment of a pregnant woman, whose side effect is a negative impact on the foetus[61]. This concept is based on the assumption that the mother's interests in comparison with the interests of the conceived child cannot be treated in a worse way, and the mother's withdrawal from treatment in the event of a threat to her life or health under the sanction of the liability for damages is unacceptable[62].

The provision of Art. 446^1 of the CC is the basis of the liability for all damages, and therefore both property and non-property (on property and person)[63].

Due to the fact that the Polish civil law system accepts pluralism of liability principles, it can be based on the principle of guilt, risk and equity, and both intentional and unintentional guilt can be attributed to the entity causing prenatal damage[64].

Prenatal damage may be direct as well as indirect[65]. Direct damage takes place when the action or behaviour of the entity causing it will have a direct effect in the conceived child[66]. As J. Haberko points out, an example of direct damage can be an aamniocentesis procedure faultily carried out on a conceived child[67]. In turn, the indirect damage covers cases of action or omission in relation to a pregnant woman (e.g. administration of drugs with embryo or foetus toxic effects)[68], as well as the damage suffered by the child in connection with the death of the father, if it occurred during the pregnancy, where this attitude is the basis for diverging opinions in the doctrine as to the basis of the liability for damages[69].

[59] J. Haberko, *Komentarz...*, p. 1862.

[60] These injuries are primarily indicated in the foreign case-laws, compare A. Heldrich, *Der Deliktschutz des Ungeborenen*, JZ 1965, no. 19, p. 593 and following; R. Schmidt, *Der Schutz der Leibesfrucht gegen unerlaubte Handlung*, JZ 1952, no. 8, p. 167; G. Gaisbauer, *Die "programmierte Geburt" aushaftungsrechtlicher Sicht*, VersR 1994, book 22, p. 904; W. Kapp, *Der Fötusals Patient?*, MedR 1986, book 5, p. 275 and following.

[61] E. Łętowska, *Przyczynienie się małoletniego do wyrządzenia szkody*, NP 1965/2 p.130 and following 7 LEX No. 6291, J. Mazurkiewicz, *Komu wolno szkodzić bezkarnie. Nasciturus. Cywilnoprawna podmiotowość dziecka poczętego*, „Rzeczpospolita" 1997, no. 122.

[62] J. Haberko, *Komentarz...*, p. 1865.

[63] A. Olejniczak, *Komentarz do art. 446^1 Kodeksu cywilnego* [in:] *Kodeks cywilny. Tom III. Zobowiązania. Część ogólna*, pod red. A. Kidyby, Warszawa 2014, p. 581., A. Cisek, W. Dubis, *Komentarz do art. 446^1 Kodeksu cywilnego* [in:] *Kodeks cywilny. Komentarz*, edited by E. Gniewko, P. Machnikowski, Warszawa 2017, p. 950.

[64] J. Haberko, *Komentarz...*, p. 1862.

[65] J. Haberko, *Komentarz...*, p. 1862.

[66] Ibidem.

[67] Ibidem.

[68] J. Heberko, *Cywilnoprawna ochrona dziecka poczętego, a stosowanie procedur medycznych*, Oficyna 2010, LEX no. 114901.

[69] J. Haberko, *Komentarz...*, p. 1862; The basis of liability is assumed to be the broader interpretation of the provision of Article 446 § 2 of the Civil Codeor Art. $446^1$of the Civil Code, M. Safjan, *Komentarz do art. 446^1 Kodeksu cywilnego* [in]: *Kodeks Cywilny. Tom I. Komentarz. Art. 1-449^{10}*, edited by K. Pietrzykowski, vol. I, Warszawa 2015, p.1518-1519; Z. Radwański, A. Olejniczak, *Zobowiązania...,* p. 272; A. Szpunar, *Odszkodowanie za szkodę*

CONSEQUENTIAL DAMAGE, PRECONCEPTION DAMAGES (PRECONCEPTION INJURIES)

A debatable issue under the responsibility for prenatal damage is the so-called consequential damages, also called preconception damages (*preconception injuries*)[70]. Preconception damages differ from prenatal injuries above all on the moment when a causative event occurs.

The question then arises – whether on the basis of Art. 4461 of the Civil Code, there is a possibility of making a claim in the case when the action causing the damage took place before the conception of the child, however, the effects of these actions have already had effect after fertilization[71]. The effects of specific actions, such as the abuse of narcotic drugs, drugs, alcohol, dangerous sexual behaviours leading, among others, to venereal infections, or the lack of periodic health control of potential parents could become visible even during pregnancy and even after the birth of the child[72]. As J. Haberko points out, it is possible to qualify also future parents' use of methods of medically assisted procreation-within this category of activities[73].

On the basis of the outlined issues, it is worth quoting the ruling from 1952 issued by the German Supreme Court[74]. On the basis of the factual situation in which the child's mother had been infected with a sexually transmitted disease for several years before its conception, in this case with syphilis, the court accepted the physician's liability for damages for the child born with signs of congenital syphilis[75].

As A. Cisek and W. Dubis point out in Polish law, a literal interpretation of the provision of Art. 446^1 of the Civil Code does not support the possibility of adopting the aforementioned concept, nevertheless, teleological considerations may be a support for this position[76].

In turn, T. Justyński is of the opinion that not all cases of damage caused before conception may be connected with causing damage to a conceived but unborn baby *(nasciturus)*[77], however, although not always pre-conception events result in damage after conception[78] legal protection should be granted also in this situation.

---

majątkową: szkoda na mieniu i na osobie, Bydgoszcz 1998, p. 193; A. Rzetecka – Gil, *Komentarz do art.*446^1 *k.c* [in]: *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna*, edited by A. Rzetecka – Gil; Teza 4, Lex/el. 2011, no.15975; see Resolution of the Full Composition of the Supreme Court of 30 November 1987, III PZP 36/87, OSNCP 1988, No. 2-3, item 23; Judgement of the Supreme Court of 4 April 1966, II PR 139/66, OSNCP 1966, No. 9, item 158, Justification of the judgement of the Supreme Court of 11 January 1967, I PR 510/66, OSNCP 1967, No. 7-8, item 141.

[70] T. Justyński, *Poczęcie* ..., M. Nesterowicz, *Prawo medyczne*, Toruń 2001, p. 175; M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, p. 174 and following.

[71] A. Cisek, W. Dubis, *Komentarz...,* p. 950.

[72] J. Haberko, *Komentarz...*, p. 1862; S. Stieglitz, *Die wrongful birth und wrongful life Problematik im deutschen Delikts-recht*, München 1989, p. 170.

[73] Ibidem.

[74] Ruling of the German Supreme Court (Bundesgerichtschof) of 20 December 1952, BGHZ, vol. 8, p. 243.

[75] Ibidem.

[76] A. Cisek, W. Dubis, *Komentarz...,* p. 950.

[77] T. Justyński, *Poczęcie...*

[78] W. Selb, *Schädigung des Menschen vor Geburt – ein Problem der Rechtsfähigkeit?*, AcP 1966, vol. 166, pp. 79-80.

THE LEGAL SITUATION OF THE NASCITURUS

According to Art. 8 of the Civil Code, man acquires the legal capacity at the moment of birth. The legal capacity of every human being results from inalienable and inherent dignity, it is an expression of equality of everyone before the law and its adaptation to the needs and possibilities of man, in accordance with the principles of humanism[79]. In connection with the above, according to the literal interpretation, a child conceived but not born yet has no legal capacity, but this issue is the subject of discussion in civilian doctrine[80].

In Art. 6 of general civil law regulations from 1950[81] the legislator introduced a legal definition of legal capacity, defining it as rights and obligations in the field of the civil law, which every person has from birth, with the proviso that sex, race, nationality, religion or social origin do not affect the legal capacity. This provision became the basis for the Supreme Court, which in the resolution containing guidelines for justice and judicial practice indicated that in the proceedings pertaining to the establishment of paternity, it is not permissible to issue judgments in that respect from the conception of the child until its birth, because the child does not have legal capacity and hence cannot be a party to the trial[82]. Thus, the unborn child does not exist as a subject of rights and duties[83]. The views of the Supreme Court were approved by the representatives of the doctrine, stressing that the *nasciturus* is only a "carrier of the legally protected rights and interests of an individual", and the only protection that can be granted to him is indirect protection expressed through "prenatal interests of an individual"[84]. Nevertheless, a part of the provisions of the Civil Code indicated the possibility of treating a conceived child as an entitlement subject (e.g. Article 927 § 2 of the Civil Code)[85]. It was also claimed that in order to grant protection to the *nasciturus*, its legal capacity was derived in a non-natural way[86]. Part of the doctrine, in turn, advocated granting the conceived but unborn child conditional legal capacity[87].

In the Law of 7 January 1993 on family planning, protection of the human foetus and conditions of acceptability of termination of pregnancy[88]the legisla-

[79] Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2003, p. 148-151; A. Klein, *Zdolnośc prawna, zdolnośc do czynności prawnych i inne zdolności a klasyfikacja zdarzeń prawnych*, SC 1969, vol. XIII-XIV, p. 163; R. Majda, *Komentarz do art. 8 Kodeksu cywilnego* [in:] *Kodeks cywilny. Część ogólna. Komentarz*, edited by M. Pyziak – Szafnicka, Warszawa 2009, LEX no. 35.

[80] J. Haberko, *Wyrządzenie*..., p. 164.

[81] The Act of 18 July 1950 General Provisions of Civil Law (Journal of Laws 1950, No. 34, item 311).

[82] Resolution of the entire Civil Chamber of the Supreme Court of 6 December 1952 containing guidelines for the administration of justice and judicial practice, OSN 1953, No. 2, item 31.

[83] Ibidem.

[84] J. Gwiazdomski, *Pochodzenie dziecka od męża matki*, Studia Cywilistyczne, Warszawa 1977, vol. XXVIII, p. 20.

[85] W. Bendza, *Zdolnośc prawna nasciturusa – ze szczególnym uwzględnieniem kwestii odszkodowawczych*, Przegląd Legislacyjny No. 3 (97)/2016, p. 29.

[86] T. Smyczyński, *Pojęcie i status prawny dziecka poczętego*, Studia Prawnize 1989, book 4, p. 21.

[87] J. Witecki, *Osoby i ich zdolnośc do czynności prawnych*, Przegląd Notarialny, 1950, book 11-12, p. 393-394; A. Wolter, *Prawo cywilne. Część ogólna*, Warszawa 1955, p. 96, 138-139; S. Grzybowski, *System prawa cywilnego. Część ogólna*, Warszawa 1974, p. 306-308.

[88] Law of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility

tor decided to add to Art. 8 of the Civil Code § 2, in which he determined that „the legal capacity also has a conceived child; however, he obtains rights and property obligations on the condition that it is born alive". On the other hand, in accordance with the Regulation of the Minister of Health of 9 November 2015 on the types, scope and patterns of medical documentation and the manner of its processing[89], live birth is defined as the total expulsion or extraction of the newborn from the mother's system, regardless of the duration of pregnancy, which after such expulsion or extraction breathes or shows any other signs of life, such as the heart function, umbilical pulsation or pronounced contractions of voluntary muscles, regardless of whether the umbilical cord was cut or the placenta was separated.

In the current legal status, the legal subjectivity of a person is understood as the ability to be a subject of rights and obligations, in addition it is supplemented and updated by legal capacity[90]. Despite this, divergent views on the legal capacity with regard to the *nasciturus* are also currently being voiced.Some authors believe that with reference to the clear content of Art. 8 of the Civil Code, the conceived child is not entitled to legal capacity[91], and the criterion for obtaining it is the birth of a live child. On the other hand, the *nasciturus* conditional legal capacity theory would be right only if Art. 8 § 2 of the Civil Code was still in force[92]. On the other hand, the authors who favour the award of conditional legal capacity to the *nasciturus* emphasize that until the conceived child is born alive, the effects of legal events are suspended in relation to it.[93].

Z. Radwański believes that Art. 8 of the Civil Code indicating that acquiring of the legal capacity only at the time of the birth of a man is outdated, inadequate, and hence – has become obsolete[94]. In addition, B. Kaczmarek emphasizes that there is a category of rights that belong to the *nasciturus* from the moment of conception and they are not dependent on the fulfilment of any additional conditions, including live birth[95].

The issue of *nasciturus'* powers was also the subject of case-law. As an example, you can indicate the Supreme Court's ruling from 1971[96], in which the Court stated that there is no reason to differentiate the legal situation of a conceived child, but the unborn and a child that was already born, because the legislator's will was

of termination of pregnancy (Journal of Laws 1993, No. 17, item 78, as amended) – Art. 6 point 1 letter b. In 1996, the Law of 30 August 1996 amending the law on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy and amending certain laws (Journal of Laws of 1996, No. 139, item 646) returned to the previous wording Art. 8 of the Civil Code.

[89] Regulation of the Minister of Health of 9 November 2015 on the types, scope and examples of medical documentation and the manner of its processing (Journal of Laws 2015, item 2069).

[90] Ibidem, p. 165; W. Lang, *W sprawie prawnego statusu nasciturusa*, Państwo i Prawo, 1983, book 6, p. 107.

[91] T. Smyczyński, *Nasciturus jako podmiot roszczeń odszkodowawczych*, Prawo Asekuracyjne 1995, no. 3, p. 15.

[92] S. Dmowski, R. Trzaskowski [in:] *Kodeks cywilny. Komentarz. Część ogólna*, vol. I, edited by J. Gudowski, Warszawa 2014, p. 93-94.

[93] M. Pazdan [in:] *Kodeks cywilny. Komentarz*, vol. I, Warszawa 2015, p. 80.

[94] Z. Radwański, *Zielona Księga. Optymalna wizja Kodeksu Cywilnego w Rzeczypospolitej Polskiej*, edited by Z. Radwański, Warszawa 2006, p. 38.

[95] B. Kaczmarek, *Prawa*..., p. 128.

[96] Judgment of the Supreme Court of 7 October 1971, Ref. act III CRN 255/71, TSO 1972, No. 9, pp. 411-413.

to guarantee the rights of the *nasciturus*, not the resolution of its legal capacity. However, in 1996 (at a time when Article 8 (2) of the Civil Code was in force) the Supreme Court[97] decided that the person subject to repression in the Nazi concentration camps was also a conceived child, provided that he was born alive.

As a result of grantinga subject the attribute of a person, the essential issue becomes the indication of what activities are allowed and prohibited in relation to it[98], whereas it should be emphasized that as indicated by, among others, A. Zoll or L. Bosek life protection also covers the period of the human foetal life[99]. However, even the views of the doctrine as to the determination of the *nasciturus* itself are not compatible. According to one view the *nasciturus* is a child from the time of fertilization of the woman's egg[100], this position coincides with the obligatory protection of the rights of the fertilized egg cell and the rights of the child, due to the fact that in recent times thanks to the progress of among others medicine or biotechnology, the moment of fertilization (extracorporeal) can be distanced in time even by several months or years, from the implantation of the embryo[101]. Other authors indicate that the *nasciturus* begins its existence at the moment when the implanted egg begins to grow in the mother's body (the place where the embryo is formed does not matter)[102], this view, however, does not reject the concept of embryo protection in the preimplantation phase[103]. In the opinion of J. Haberko, if the legal protection of a conceived child in the absence of consent for causing damage to the *nasciturus* was separated from its legal capacity, there would be a situation in which it is uncertain whether the child could ever use the legal capacity granted in the future[104]. Assuming that the legislator, while admitting the legal capacity of a conceived child under the condition of it being born live, in spite of everything, it is not tantamount to protecting the life and health of the conceived child[105]. In its ruling from 1997, the Constitutional Tribunal stated that it is necessary to extend the existing scope of the legal ca-

[97] Judgment of the Supreme Court of 29 May 1996, reference number act III ARN 96/95, OSNP 1996, No. 24, item 366, the verdict was issued in connection with the Act of 24 January 1991 on combatants and certain persons who were victims of war and post-war repression (Journal of Laws of 1991, No. 17, item 75, as amended). See. Judgment of the Supreme Administrative Court of 19 August 2004, Ref. OSK 135/04, ONSAiWSA 2005, item 1, item 15; Judgment of the Supreme Administrative Court of 28 November 1985, Ref. III SA 1183/85, LEX No. 23148.

[98] R. Tokarczyk, *Prawa narodzin, życia i śmierci*, Kraków 2005, p, 205; B. Kaczmarek*, Prawa dziecka poczętego i ich ochrona w Polsce*, edited by B. Banaszaka, Przegląd Prawa i Adminisracji 2005, vol. LXIX, p. 126.

[99] A. Zoll, *Opinia prawna w sprawie konstrukcji prawnej i skutków projektu zmiany art. 30 i 38 Konstytucji RP*, [in:] *Konstytucyjna formuła ochrony życia*, Druk Sejmowy no. 993, Warszawa 2007, p. 104; L. Bosek, *Roszczenia wrongful life i wrongful birth w świetle standardów konstytucyjnych i europejskich*, Przegląd Sądowy 2008, no. 1, p. 40.

[100] P. Księżak [in:] *Kodeks cywilny. Komentarz*, vol. I, edited by K. Osajdy, Warszawa 2013, p. 339.

[101] J. Haberko, *Status cywilnoprawny ludzkiego embrionu w fazie przedimplantacyjnej*, Przegląd Sądowy 2008, no. 10, p. 26 and following.

[102] M. Pazdan [in:] *Kodeks...,* p. 80.

[103] L. Bosek, *Ochrona embrionów w prawie międzynarodowym i europejskim*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2007, book 3, p. 12-23; O. Nawrot, *Istota ludzka czy osoba? Status nasciturusa na gruncie Europejskiej Konwencji Bioetycznej*, Prawo i Medycyna, 2004, no. 1, p. 86-99; J. Haberko, *Cywilnoprawna*..., p. 95-108.

[104] J. Haberko, *Wyrządzenie*..., p. 167.

[105] R. Zdybel, *Nasciturus a aborcja. Problemy prawne czy etyczno – moralne. Prawna ochrona na gruncie art.. 927 § 2 k.c. i 148 § 3 k.k.*, Przegląd Sądowy 2008, no. 7-8, p. 36-58.

pacity of a child conceived to all situations in which it may be an entity[106]. Then it seems reasonable to ask whether there is a possibility of gradation of legal capacity, and what is the difference between the scope of the legal capacity of the *nasciturus* and the legal capacity of the born child?

In connection with such far-reaching doubts, in 2008 the Civil Law Codification Commission[107]proposed adding to the Civil Code a provision that would determine the rights of the *nasciturus*. According to the Commission's concept, a child conceived would be considered already born when it is beneficial for it, but it would acquire property rights if it was born alive[108], which would be a real application of the rule *nasciturus pro iam nato habetur, quotiens de commodis eius agitur*[109]. In the justification of the project, the Commission indicated that „It can be expected that the construction will allow, among others, to solve problems related to the child's recognition before birth. It is also about prenatal therapy and the need to clearly regulate the situation of a child conceived as a patient, which is also important for the situation of a doctor and medical facilities providing medical services to such a child"[110]. In addition, the moment of the child's birth was not determined, leaving the issue to these separate provisions because of the medical background[111].

Regardless of the concept of the legal capacity relating to the *nasciturus*, it should be emphasized that the protection afforded to him is derived, among others, from the right to life and health protection guaranteed in the Constitution of the Republic of Poland[112], and the right to the biological development[113], and the very existence of this legal subjectivity is not currently treated with the *sine qua non* of the liability for damages[114], whereas in the case of prenatal damage, the emphasis is placed on the causative event and the causal relationship.

CONCLUSION

Responsibility for prenatal damage plays an important role in the protection of the rights of a conceived child that in the future, after being born, will be

[106] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK ZU 1997, No. 2, item 19.

[107] Regulation of the Council of Ministers of 22 April 2002 on the creation, organization and mode of operation of the Civil Law Codification Commission (Journal of Laws of 2002, No. 55, item 476, as amended).

[108] Civil Law Codification Commission operating at the Ministry of Justice, First Book of the Civil Code. Project with justification, Warszawa 2008, https://bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf, zob. art. 9 [access: 28.11.2017].

[109] T. Sokołowski*, Sytuacja prawna nasciturusa w art. 9 projektu kodeksu cywilnego*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2009, book 2, p. 191 and following.

[110] Civil Law Codification Commission operating at the Ministry of Justice, First Book of the Civil Code. Project with justification, Warszawa 2008, https://bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf, see Art. 9 [access: 28.11.2017].

[111] Civil Law Codification Commission operating at the Ministry of Justice, First Book of the Civil Code. Project with justification, Warszawa 2008, https://bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf, zob. art. 9 [access: 28.11.2017].

[112] J. Haberko, *Wyrządzenie*..., p. 171.

[113] S. Chrempiński, *Czy dziecko poczęte powinno być uznane za podmiot prawa*, Nowe Prawo, 1958, no. 2, p. 87 and following

[114] T. Justyński, *Poczęcie*...

provided with the opportunity to claim its rights in the form of a claim to repair the damage suffered during the prenatal period.However, although seemingly, the editions of the provision of Art. 446^1 of the Civil Code is clear, its wording arouses doubts, even in the range of the moment of child's birth,the legal capacity of the conceived child, and even whether the child could make a possible claim against its mother, which is characterised by some of the representatives of the doctrine as the abuse of the legal right.

In connection with the above, it should be emphasized that an extremely important, and as already mentioned, a controversial issue is the indication of the moment from which life starts and, hence, when the legal protection of life begins.However, this issue, for moral or ethical reasons, is almost impossible to determine in an exact way, while setting a clear boundary. In addition, it seems reasonable to clarify the provision of Art. 446^1 of the Civil Code through simultaneous indication that the child might claim preconception damages. Perhaps it would be worthwhile to lean again on the content of Art. 8 of the Civil Code and its updating, so that the legal protection of the child, including the child who has not yet been born, was as wide as possible and included the *nasciturus* without having to meet the condition of live birth.

It would also seem reasonable to accept the child's mother's liability for damages, and thus for the born child to make a claim against a woman who gave birth to it when the mother would be the party doing the harm, e.g. by avoiding the required tests during the pregnancy, drinking alcohol, taking drugs, or other intoxicants, or simply neglecting her body, which will give birth to a child.

Moreover, in relations to the issue of liability for prenatal damage, the difference between the institution from Art. 446^1 and the claims due to *wrongful conception*, *wrongful birth* and *wrongful life* should be emphasized.

However, a legal analysis of prenatal damage allows us to accept the thesis that the human life and health, even before its birth, are subject to special protection from the legislator, but this protection should be clarified.

Bibliography

LITERATURE

Banaszak B., Jabłoński M., *Teza 2 do art. 38* [in:] *Konstytucje Rzeczypospolitej Polskiej oraz komentarz do Konstytucji RP z 1997 roku*, edited byBocia J., Wrocław 1998;

Bendza W., *Zdolnośc prawna nasciturusa – ze szczególnym uwzględnieniem kwestii odszkodowawczych*, „Przegląd Legislacyjny", No. 3 (97)/2016.

Bieniek G. [in:] *Komentarz do Kodeksu cywilnego. Księga trzecia. Zobowiązania*, vol. 1, ed. Ciepłej H., Dmowskiego S., Gudowskiego J., Kołakowskiego K., Sychowicza M., Wiśniewskiego T., Żuławskiej C., Warszawa 2011.

Bilecka M., *Proces o „złe urodzenie" (uwagi do wyroków Sądu Okręgowego w Łomży oraz Sądu Apelacyjnego w Białymstoku)*, „Prawo i Medycyna" no. 3/2005;

Bosek L., *Ochrona embrionów w prawie międzynarodowym i europejskim*, „Ruch prawniczy, Ekonomiczny i Socjologiczny", 2007, book 3.

Bosek L., *Roszczenia wrongful life i wrongful birth w świetle standardów konstytucyjnych i europejskich*, „Przegląd Sądowy", 2008, no. 1.

Chrempiński S., *Czy dziecko poczęte powinno być uznane za podmiot prawa*, „Nowe Prawo", 1958, no. 2.

Cisek A., Dubis W., *Komentarz do art. 446[1] Kodeksu czwilnego* [in:] *Kodeks cywilny. Komentarz*, edited by Gniewka E., Machnikowskiego P., Warszawa 2017.

Czajkowska-Matosiuk K., *Prawo cywilne – część ogólna, prawo rzeczowe i zobowiązania*, Warszawa 2009.

Dmowski S., Trzaskowski R. [in:] *Kodeks cywilny. Komentarz. Część ogólna*, vol. I, edited by Gudowski J., Warszawa 2014.

Frączek P., Jabłońska M., Pawlikowski J., *Medyczne, etyczne, prawne i społeczne aspekty badań prenatalnych w Polsce*, „Medycyna Ogólna i Nauki o Zdrowiu", vol. 19, book 2, 2013.

Gaisbauer G., *Die "programmierteGeburt" aushaftungsrechtlicherSicht*, "VersR" 1994, book 22.

Grabowski R., *Prawo do ochrony życia w polskim prawie konstytucyjnym*, Rzeszów 2006.

Grzybowski S., *System prawa cywilnego. Część ogólna*, Warszawa 1974.

Gwiazdomski J., *Pochodzenie dziecka od męża matki*, „Studia Cywilistyczne", Warszawa 1977, vol. XXVIII.

Haberko J., *Cywilnoprawna ochrona dziecka poczętego, a stosowanie procedur medycznych*, Oficyna 2010, LEX no. 114901.

Haberko J., *Komentarz do art. 446[1] Kodeksu cywilnego* [in:] *Kodeks cywilny. Tom I. Komentarz Art. 1-449[11]*, edited by Gutowski M., Warszawa 2016.

Haberko J., *Status cywilnoprawny ludzkiego embrionu w fazie przedimplantacyjnej*, „Przegląd Sądowy" 2008, no. 10.

Haberko J., *Wyrządzenie szkody prenatalnej w kontekście zdolności prawnej dziecka poczętego* [in:] *Czyny niedozwolone w prawie polskim i prawie porównawczym, Materiały IV Ogólnopolskiego Zjazdu Cywilistów*, edited by Nesterowicz M., Warszawa 2012.

Heldrich A., *Der Deliktschutz des Ungeborenen*, "JZ" 1965, no. 19.

Justyński T., *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Zakamycze 2013, LEX no. 40218.

Justyński T., *Glosa do wyroku Sądu Apelacyjnego w Białymstoku, I Wydział Cywilny z dnia 4 lipca 2008 r., I AcA 278/08*, „Prawo i Medycyna" 2009, no. 4 (37, vol. 11).

Kaczmarek B., *Prawa dziecka poczętego i ich ochrona w Polsce*, pod red. Banaszaka B., „Przegląd Prawa i Adminisracji", 2005, vol. LXIX.

Kapp W., *Der Fötusals Patient?*, "MedR", 1986, book 5.

Kardas P., Sroka T., Wróbel W., *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. III, WKP 2012, LEX no. 156000.

Klein A., *Zdolnośc prawna, zdolnośc do czynności prawnych i inne zdolności a klasyfikacja zdarzeń prawnych*, „Studia Cywilistyczne", 1969, vol. XIII-XIV;

Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości, Księga Pierwsza Kodeksu Cywilnego. Projekt wraz z uzasadnieniem, Warszawa 2008, https://bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf, zob. art. 9 [access: 28.11.2017]

Księżak P. [in:] *Kodeks cywilny. Komentarz*, vol. I, edited by Osajda K., Warszawa

2013.
Kuczma P., *Prawna ochrona życia* [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, edited by Jabłoński M., Wrocław 2014.
Kuźmicka-Sulikowska J., *Zasady odpowiedzialności w świetle nowych tendencji w ustawodawstwie polskim*, LEX 2011.
Lang W., *W sprawie prawnego statusu nasciturusa*, „Państwo i Prawo", 1983, book 6;
Łętowska E., *Przyczynienie się małoletniego do wyrządzenia szkody*, „NP." 1965/2s.130 and following 7 LEX No. 6291.
Łuczak – Wawrzyniak J., Diagnostyka *prenatalna – analiza celu badania z perspektywy lekarza, matki/rodziców, płodu/dziecka*, „Perinatologia, Neonatologia i Ginekologia", vol. 6, book 1, 2013.
Łuczak-Wawrzyniak J. , Skrzypczak J., Rajewski M., *Perinatal palliative care – ethical and moral challenge of XXI century*, "Arch. Perinat. Med.", 12(2), 2006.
M. Shaw, *Conditional Prospective Rights of the Fetus*, "5 J. Legal Med.", 63, 111 (1984), after: Botkin [2002].
Majda R., *Komentarz do art. 8 Kodeksu cywilnego* [in:] *Kodeks cywilny. Część ogólna. Komentarz*, edited byPyziak – Szafnickiej M., Warszawa 2009, LEX no. 35.
Mazurkiewicz J., *Komu wolno szkodzić bezkarnie. Nasciturus. Cywilnoprawna podmiotowość dziecka poczętego*, „Rzeczpospolita" 1997, no. 122.
Michałowska K., *Artykuł 446[1] k.c. jako podstawa dochodzenia roszczeń z tytułu szeroko rozumianych szkód prenatalnych powstałych w wyniku działań medycznych* [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, edited by Ogiegło L., Popiołka W., Szpunara M., Kraków 2005.
Nawrot O., Istota *ludzka czy osoba? Status nasciturusa na gruncie Europejskiej Konwencji Bioetycznej*, „Prawo i Medycyna", 2004, no. 1;
Nesterowicz M., *Prawo medyczne*, Toruń 2001;
Olejniczak A., *Komentarz do art. 446[1] Kodeksu cywilnego* [in:] *Kodeks cywilny. Tom III. Zobowiązania. Część ogólna*, edited by Kidyba A., Warszawa 2014.
Paprzycki L.K., *Granice prawnokarnej ochrony zycia i zdrowia człowieka na tle orzecznictwa Sądu Najwyższego w latach 2006-2010*, „Medyczna Wokanda" 2010, no. 2.
Pazdan M. [in:] *Kodeks cywilny. Komentarz*, vol. I, Warszawa 2015.
Radwański Z., Olejniczak A., *Zobowiązania – część ogólna*, Warszawa 2016.
Radwański Z., *Prawo cywilne – część ogólna*, Warszawa 2003.
Radwański Z., *Zielona Księga. Optymalna wizja Kodeksu Cywilnego w Rzeczypospolitej Polskiej*, edited by Z. Radwański, Warszawa 2006.
Rzetecka – Gil A., *Komentarz do art.446[1]k.c* [in]: *Kodekscywilny. Komentarz. Zobowiązania - część ogólna*, edited by Rzetecka – Gil A.; Teza 4, Lex/el. 2011, no. 15975.
Safjan M., *Komentarz do art. 446[1] Kodeksu cywilnego* [in]: *Kodeks Cywilny. Tom I. Komentarz. Art. 1 - 449[10]*, edited by Pietrzykowski K., vol. I, Warszawa 2015.
Safjan M., *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990.
Schmidt R., *Der Schutz der Leibesfruchtgegen unerlaubteHandlung*, "JZ", 1952, no. 8.
Selb W., *Schädigung des Menschen vor Geburt – ein Problem der Rechtsfähigkeit?* "AcP", 1966, vol. 166;
Serwach M., *Wina jako zasada odpowiedzialności cywilnej oraz okoliczność zwalniająca z obowiązku naprawienia szkody*, „Wiadomości Ubezpieczeniowe", 1/2009.
Sitek W., *Zadośćuczynienie w sprawach wrongful life w świetle prawa polskiego*, „Pań-

stwo i Prawo" 8/2010.
Smyczyński T., *Nasciturus jako podmiot roszczeń odszkodowawczych*, „Prawo Asekuracyjne", 1995, no. 3.
Smyczyński T., *Pojęcie i status prawny dziecka poczętego*, „Studia Prawnize", 1989, book 4.
Sokołowski T., *Sytuacja prawna nasciturusa w art. 9 projektu kodeksu cywilnego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny", 2009, book 2.
Soniewiecka M., *Regulacje prawne wobec rozwoju nowoczesnych technik kontroli prokreacji: analiza roszczenia wrongful life*, „Diametros" no. 19 (March 2009);
Stembalska A., Nomejko A., Pesz K., *Poradnictwo prenatalne – diagnostyka prenatalna inwazyjna*, „Perinatologia , Neonatologia i Ginekologia", vol. 5, book 2, 2012.
Stieglitz S., *Die wrongful birth und wrongful life Problematik im deutschen Delikts-recht*, München 1989.
Syweńki E., Suchańska D., Dobrowolska D., *Płód jako pacjent-rys historyczny*, „Perinatologia, Neonatologia i Ginekologia", 1(4): 3, 2008.
Szpunar A., *Odszkodowanie za szkodę majątkową: szkoda na mieniu i na osobie*, Bydgoszcz 1998.
Sztychmiler R., *Konstytucyjna ochrona życia ludzkiego*, „Przegląd Prawa Wyznaniowego" vol. 5 (2013)
Tokarczyk R., *Prawa narodzin, życia i śmierci*, Kraków 2005.
Wertz D.C., Fletcher J.L., Berg K., *Review of Ethical Issues in Medical Genetics. Report of Consultants to WHO*, WHO/HGN/ETH/00.4, 2003.
Więckiewicz K., *Czy w Polsce istnieje prawo kobiety do badań prenatalnych?*, Prawo i Medycyna, 4/2011 (45, vol. 13).
Winczorek P., *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Warszawa 2000.
Witecki J., *Osoby i ich zdolnośc do czynności prawnych*, „Przegląd Notarialny", 1950, book 11-12;
Wolter A., *Prawo cywilne. Część ogólna*, Warszawa 1955.
Zdybel R., *Nasciturus a aborcja. Problemy prawne czy etyczno – moralne. Prawna ochrona na gruncie art.. 927 § 2 k.c. i 148 § 3 k.k.*, „Przegląd Sądowy", 2008, no. 7-8.
Zielińska E., *Konstytucyjna ochrona prawa do życia od momentu poczęcia (uwagi krytyczne do projektu zmiany art. 38 Konstytucji),* „Państwo i Prawo" 3/2007.
Zoll A., *Opinia prawna w sprawie konstrukcji prawnej i skutków projektu zmiany art. 30 i 38 Konstytucji RP*, [in:] *Konstytucyjna formuła ochrony życia*, *Druk Sejmowy nr 993*, Warszawa 2007.
Zoll A., *Problemy służby zdrowia w świetle doświadczeń RPO*, „Prawo i Medycyna", no. 8, 2000.

LEGAL ACTS

The Code of Medical Ethics of 2 January 2004 (consolidated text, containing the amendments adopted on 20 September 2003 by the Extraordinary VII National Congress of Physicians).
Constitution of the Republic of Poland of 2 April 1997, (Journal of Laws of 2009, No. 114, item 946).
The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws of 1991 No. 120, item 526).

Announcement of the President of the Constitutional Tribunal of 18 December 1997 on the loss of binding force of Art. 1 point 2, Art. 1 point 5, Art. 2 point 2, Art. 3 point 1 and Art. 3 point 4 of the Law amending the Law on family planning, protection of the human fetus and conditions of acceptability of termination of pregnancy and on the amendment of some other laws (Journal of Laws 1997, No. 157, item 1040).

Rozporządzenie Ministra Zdrowia z dnia 9 listopada 2015 roku w sprawie rodzajów, zakresu i wzorów dokumentacji medycznej oraz sposobu jej przetwarzania (Dz.U. 2015, poz. 2069).

Regulation of the Council of Ministers of 22 April 2002 on the creation, organization and mode of operation of the Civil Law Codification Commission (Journal of Laws of 2002, No. 55, item 476, as amended).

Law of 18 July 1950 on general civil law (Journal of Laws 1950, No. 34, item 311).

Law of 23 April 1964 Civil Code (Journal of Laws 2017, item 1132).

Law of 24 January 1991 on combatants and certain persons who are victims of war and post-war repression (Journal of Laws of 1991, No. 17, item 75, as amended).

The Law of 25 February 1964, the Family and GuardianshipCode (Journal of Laws of 2017, item 682).

Law of 30 August 1996 amending the act on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy and amending certain acts (Journal of Laws of 1996, No. 139, item 646).

Law of 4 December 1996 amending the act on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws of 1996, No. 139, item 646).

Law of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws 1993, No. 17, item 78).

Law of 7 January 1993 on family planning, protection of human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws 2001, No. 154, item 1792).

Law of 7 January 1993 on family planning, protection of human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws 1993, No. 17, item 78, as amended).

Law of 7 January 1993 on family planning, protection of human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws 2001 No. 154, item 1792).

RULINGS

Ruling of the German Supreme Court (Bundesgerichtschof) of 20 Decmeber 1952, BGHZ, vol. 8.

Ruling of the Apellate Court in Michiganon the case Bushman v. Burns Clinic Medical Center (268 Northwestern Report 2d. 683, Michigan 1978).

Ruling of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK ZU 1997, no. 2 item 19.

Resolution of the entire Civil Chamber of the Supreme Court of 6 December 1952 containing guidelines for the administration of justice and judicial practice, OSN 1953, No. 2, item 31.

Resolution of the Full Composition of the Supreme Court of 30 November 1987, III PZP 36/87, OSNCP 1988, No. 2-3, item 23.

Justification of the Supreme Court judgment of 11 January 1967, I PR 510/66, OSNCP 1967, No. 7-8, item 141.
Judgment of the Supreme Administrative Court of 19 August 2004, Ref. OSK 135/04, ONSAiWSA 2005, book 1, item 15.
Judgment of the Supreme Administrative Court of 28 November 1985, Ref. III SA 1183/85, LEX No. 23148.
Judgment of the Supreme Court of 4 April 1966, II PR 139/66, OSNCP 1966, No. 9, item 158.
Judgment of the Supreme Court of 7 October 1971, referencenumber III CRN 255/71, TSO 1972, No. 9.
Judgment of the Supreme Court of 8 January 1965, II CR 2/65, OSPiKA 1967, item 9, item 220 with the gloss of A. Szpunar.
Judgment of the Court of Delaware (Superior Court of Delaware) in the case of Coleman v. Garisson (327 Atlantic Report 2d 757, Delaware 1974).

Summary: This article describes the issue of responsibility for injury suffered before the birth of a child in the context of the protection rights of conceived children.The right to life, as well as the right to health in relation to the child in the prenatal phase, and the right to prenatal tests done in the mother were indicated. The text shows the fundamental differences between the often misunderstood claims of wrongful birth, wrongful birth and wrongful life, with responsibility for prenatal injuries under Rule 446 Civil Code. The main issues related to the legal issue of the *nasciturus*were also highlighted.

Key words: prenatal injuries, prenatal tests, nasciturus, legal capacity, liability for damage, wrongful conception, wrongful birth, wrongful life.

ODPOWIEDZIALNOŚC ZA SZKODY DOZNANE PRZED URODZENIEM W KONTEKŚCIE OCHRONY PRAW DZIECKA POCZĘTEGO

Streszczenie: Niniejszy tekst podejmuje tematykę związaną z odpowiedzialnością za szkody doznane przed urodzeniem się dziecka w kontekście ochrony praw dziecka poczętego. Zostały wskazane podstawy prawa do życia, a także prawa do ochrony zdrowia w odniesieniu do dziecka w fazie prenatalnej, a także do prawa poddania się badaniom prenatalnym przez matkę. W tekście omówiono również podstawowe różnice pomiędzy często błędnie utożsamianymi rozszczeniami z tytułu wrongfulconception, wrongfulbirth i wrongful life z odpowiedzialnością za szkody prenatalne na podstawie art. 446^1 Kodeksu cywilnego. Wskazano również na główne problemy związane z kwestią zdolności prawnej nasciturusa.

Słowa kluczowe: szkody prenatalne, odpowiedzialność odszkodowawcza, badania prenatalne, *nasciturus*, zdolnośc prawna, *wrongful conception*, *wrongful birth*, *wrongful life*.