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# The Scale and Diversity of References to Emotion in Polish Case Law on Personal Injury<sup>2</sup>

## 1. Introduction

The classic dogma that law should embody pure reason and that emotions have little place in it unless as a disruption might have been adamant twenty years ago. But today, it is challenged by the rising Law and Emotion scholarship, which has aimed to bring to light emotions hiding in legal theories, institutions, and courtrooms, where affective states of legal actors may have a bigger impact than previously thought. Within this strand of scholarship, researchers have been able to demonstrate that emotion<sup>3</sup> is the driving force behind several contemporary fixtures of the legal world, such as crimes of passion,<sup>4</sup> shaming penalties,<sup>5</sup> or victim impact statements,<sup>6</sup> and that it exerts influence on seemingly neutral procedures like juries viewing graphic evidence.<sup>7</sup> Although initially Law and Emotion was focused on the common law systems and especially Anglo-American contexts, scholars of different legal systems in various parts of the world (e.g., Asia, Europe, Oceania) have not lagged behind, taking on problems of emotions of judges and their role in legal proceedings,<sup>8</sup> as well as in legal issues particular for

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<sup>3</sup> Throughout this text, I will refer to emotions and feelings synonymously, although both of these terms will be examined separately in the empirical analysis (in this case, they will be distinguished by quotation marks). Although scholars like Antonio Damasio draw a firm line between feelings and emotions, (see: A. Damasio, G. Carvalho, *The Nature of Feelings: Evolutionary and Neurobiological Origins*, "Nature Reviews Neuroscience" 2013/2, pp. 143–152), I follow the reasoning of scholars such as Robert Plutchik, whose research serves as part of my analysis, and who sees these terms as largely synonymous.

<sup>4</sup> J.E. Stannard, *Crimes of Passion: Emotion, Fault, and the Criminal Law*, in: A. Reed, M. Bohlander (eds.), *Fault in Criminal Law*, Oxford 2022, pp. 149–166; N. Feigenson, *The Passions of Law*, "Constitutional Commentary" 2001/2, pp. 445–462.

<sup>5</sup> R.A. Posner, *Emotion Versus Emotionalism in Law*, in: S.A. Bandes (ed.), *The Passions of Law*, New York 1999, pp. 309–329.

<sup>6</sup> S.A. Bandes, J. M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, "Arizona State Law Journal" 2014/46, pp. 1003–1057.

<sup>7</sup> J.M. Salerno, B.L. Bottoms, *Emotional evidence and jurors' judgments: the promise of neuroscience for informing psychology and law*, "Behavioral Sciences & the Law" 2009/2, pp. 273–296.

<sup>8</sup> For research of emotions of judges, see among others: E. Jeuland, *Emotion and Judicial Management in Civil Law countries, the French example*, 2020, <https://hal.science/hal-03030731>, access: 22.06.2024; S. Schnädelbach, *The jurist as manager of emotions: German debates on Rechtsgefühl in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotions*, "Inter Disciplines" 2015/2, pp. 47–73; P. Vasilyev, *Beyond dispassion: Emotions and*

a given location,<sup>9</sup> among others.<sup>10</sup> New, more nuanced and interdisciplinary, accounts of emotion process with the so-called affective turn help fight the stereotypes about affect and reimagine its possible role in the various domains of social life, including law.<sup>11</sup>

However, to this day, Law and Emotion was focused predominantly on rather specific and perhaps limited topics and areas of legal inquiry, most visibly on various aspects of criminal law and procedure, as well as on the emotions of judges and juries.<sup>12</sup> Certain approaches and topics have eluded the researchers: for instance, private law, and especially delict (tort) law, was shunned in favor of focus on public law,<sup>13</sup> and theoretical analyses<sup>14</sup> and detailed case studies<sup>15</sup> prevailed over more comprehensive or empirical studies of legal institutions. Moreover, since the trend was initiated by American scholars, emphasis on common law systems is still visible, leaving room for a more diverse and comparative perspective.<sup>16</sup> Little attention has been given to the institution of personal injury,<sup>17</sup> defined most broadly as damage to an individual's body or mind, which is referred to in legal discourse, depending on context, as "mental distress", "psychological/emotional damage", "non-pecuniary" or even "emotional" harm. Almost all legal systems recognize this institution, albeit under different names and with varying degrees of underlining the affective component.<sup>18</sup> The absence of discourse grounded in Law and Emotion on this topic is rather surprising, as this rather omnipresent institution tends to be deployed by courts to protect interests such as bodily integrity, reputation,

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judicial decision-making in modern Europe, "Rechtsgeschichte-Legal History" 2017/25, pp. 277–285; S. Roach Anleu, S. Bergman Blix, K. Mack, *Researching Emotion in Courts and the Judiciary: A Tale of Two Projects*, "Emotion Review" 2015/2, pp. 145–150; M. Stępień, *On the Relationship between Judicial Empathy and the Integrity of Judges*, "Krytyka Prawa" 2021/3, pp. 98–113; and many others.

<sup>9</sup> See A. Fijalkowski, S. Valderhaug, *Legal Decisions, Affective Justice, and 'Moving On?'*, "Oñati Socio-Legal Series" 2017/2, pp. 201 (for an examination of affective justice in the context of post-dictatorial Albania and post-conflict Sierra Leone); B. Toy-Cronin, *Leaving Emotion Out: Litigants in Person and Emotion in New Zealand Civil Courts*, "Oñati Socio-Legal Series" 2019/5, pp. 684–701; J. Gillespie, *The role of emotion in land regulation: An empirical study of online advocacy in authoritarian Asia*, "Law & Society Review" 2018/1, pp. 106–139.

<sup>10</sup> See also M. Soniewicka, *The Transformation of Erinyes into Eumenides: Justice as Generosity*, "Forum Prawnicze" 2021/6, pp. 3–21; S. Schnädelbach, *The Voice Is the Message: Emotional Practices and Court Rhetoric in Early Twentieth Century Germany*, "Oñati Socio-Legal Series" 2019/5, pp. 616–635; S. Pasquetti, *Legal Emotions: An Ethnography of Distrust and Fear in the Arab Districts of an Israeli City*, "Law & Society Review" 2013/3, pp. 461–492; S. Mustasaari, K. Nieminen, *Law and emotions—new paths for research?*, "No Foundations: An Interdisciplinary Journal of Law and Justice" 2021/18, pp. 1–10.

<sup>11</sup> See among others, J. Cromby, *Feeling the way: Qualitative clinical research and the affective turn*, "Qualitative Research in Psychology" 2012/1, pp. 88–98; M. Zembylas, V. Bozalek, *A critical engagement with the social and political consequences of human rights: The contribution of the affective turn and posthumanism*, "Acta Academica" 2014/4, pp. 29–47; F. Fleerackers, *Affective legal analysis*, Berlin 2019.

<sup>12</sup> S.A. Bandes (ed.), *The Passions...*; S.A. Bandes, J.L. Madeira, K.D. Temple, E.K. White (eds.), *Research Handbook on Law and Emotion*, Cheltenham-Northampton 2021, pp. 1–3.

<sup>13</sup> See e.g. D. Rozenblatt, *Introduction: Criminal Law and Emotions in Modern Europe: With an Introductory Note on Images of Legal Feeling*, "Rechtsgeschichte-Legal History" 2017/25, pp. 242–250; A. Sajó, *Constitutional Sentiments*, "Acta Juridica Hungarica" 2006/1, pp. 1–13 (on sentiments in European constitutionalism).

<sup>14</sup> B. Brożek, *The Emotional Foundations of Law: on Petrażycki's Legal Theory*, "Rivista di filosofia del diritto" 2014/2, pp. 279–288; R. Grossi, *Law, emotion and the objectivity debate*, "Griffith Law Review" 2019/1, pp. 23–36.

<sup>15</sup> S.A. Bandes, J.M. Salerno, *Emotion...*; H. Baillet, S. Cowan, V. Munro, *Second hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context*, "Journal of Law and Society" 2013/4, pp. 509–540; Å. Wettergren, S. Bergman Blix, *Empathy and objectivity in the legal procedure: The case of Swedish prosecutors*, "Journal of Scandinavian Studies in Criminology and Crime Prevention" 2016/1, pp. 19–35.

<sup>16</sup> K. Abrams, H. Keren, *Who's afraid...*; R. West, *Law's Emotions*, "Richmond Public Interest Law Review" 2015/19, pp. 339–362.

<sup>17</sup> In the remaining part of the text, I use terms "personal injury" and "non-pecuniary harm" interchangeably.

<sup>18</sup> See e.g.: S. Banakas, *Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape*, "Journal of Comparative Law" 2015/10, pp. 291–342; S. D. Ferrara, R. Boscolo-Berto, G. Viel, *Personal Injury and Damage Ascertainment Under Civil Law*, Berlin 2016.

family life, dignity, and privacy of a person. As such, it often entails naming corresponding emotional states and establishing their legal relevance.<sup>19</sup>

Personal injury is often an object of doctrinal wariness or criticism, and much of its bad press comes from its psychological aspect, perceived as unreliable or of trivial nature. Criticisms include fear of opening the floodgates of frivolous or opportunistic lawsuits, filed for nuisance or profit,<sup>20</sup> which, in certain legal contexts, was the reason for proposals of minimizing of the possibility of such claims.<sup>21</sup> Zoë Sinel's upcoming book promises perhaps the most comprehensive refutation of emotions as tort law's potential objects of protection to date. In the introductory chapter she underlines that because emotions are one-sided and do not function as means to help achieve ends, tort law should not strive to protect individual psyche.<sup>22</sup>

## 2. Research problem and the Polish context

In light of the above, emotions in the context of non-pecuniary harm may seem to be superfluous factors, at best factors with only a marginal impact on the result of the case, at worst dishonest ways of achieving a higher compensation. In either case they may not be treated seriously, as psychological phenomena influencing reality. But is that the full picture? Do courts, when talking about "suffering" and "psychological damage" refer to a mere metaphor, or do they, so to speak, take emotions seriously? In a legal setting so saturated with references to mental states, are emotions real to the legal agents? Moreover, how do they see the mental phenomena they speak of: do they group varieties of emotional experience into one indistinguishable mass called "suffering", or do they meticulously distinguish between particular kinds of emotions? If so, can emotions be spoken of in courts as harm, as an object of protection, or a part of either? And why?

A preliminary study of judicial discourse allows for a conclusion that emotions, in cases concerning personal injury, are not only extraneous factors, but can sometimes be a part of what law protects, and what non-pecuniary harm means to courts. This revelation creates a particularly promising possibility from Law and Emotion perspective: to investigate a legal institution where the impact of emotions was "hiding in plain sight" for decades. Such a study could broaden our knowledge of how law categorizes emotional experience, what sort of feelings are valued enough to warrant legal reaction and why, and what the implications are of seeing emotions as part of a legal institution.

<sup>19</sup> J.G. Langhenry, *Personal Injury Law and Emotional Distress*, "The Journal of Psychiatry and Law" 1981/1, pp. 91–109; J.J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, "Marquette Law Review" 2007/4, pp.789–920.

<sup>20</sup> M.G. Faure, T. Hartlief, N.J. Philipsen, *Funding of Personal Injury Litigation and Claims Culture: Evidence from the Netherlands*, "Utrecht Law Review" 2006/2, p. 1; K.B. Lowe, J. Milliman, H. De Cieri, P.J. Dowling, *International Compensation Practices: A Ten Country Comparative Analysis*, "Human Resource Management" 2002/1, pp. 45–66; J.N. Blumberg, *Pleading Panic: Pure Emotional Damages as Sickness or Disease for Bodily Injury Claims*, "Missouri Law Review" 2011/76, pp. 867–896; O. Ben-Shahar, A. Porat, *The restoration remedy in private law*, "Columbia Law Review" 2018/118, pp. 1901–1952; P. Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits*, "Stanford Journal of Animal Law & Policy" 2013/6, pp. 30–80.

<sup>21</sup> For US context see: M. Chamallas, *Removing Emotional Harm from the Core of Tort Law*, "Vanderbilt Law Review" 2001/54, pp. 751–765. Scholars warned that such claims could put a strain on the legal system and pervert not only the role of personal injury in society but also the shape of relationships it concerns: see S. DeFabritiis, *Barking up the wrong tree: Companion animals, emotional damages and the judiciary's failure to keep pace*, "Northern Illinois University Law Review" 2011/32, pp. 237–266.

<sup>22</sup> Z. Sinel, *Just Feelings: A Tort Law Theory of Emotion*, 2022, [https://law.ucla.edu/sites/default/files/PDFs/Law\\_and\\_Philosophy/Sinel\\_Just\\_Feelings.pdf](https://law.ucla.edu/sites/default/files/PDFs/Law_and_Philosophy/Sinel_Just_Feelings.pdf), access: 22.06.2024.

To catalogue the courts' patterns of referring to emotions, practical application of the law concerning non-pecuniary harm should be studied.

The institution that is the focus of this text in Polish law can be described as personal injury (Pol. "szkoda na osobie") or non-pecuniary harm (Pol. "szkoda niemajątkowa/krzywda"), as opposed to material damage (Pol. "szkoda na mieniu").<sup>23</sup> Personal injury concerns immaterial and personal values such as dignity, health, life, reputation, privacy, sexual integrity, close familial relationships. Many, though not all, of these values are recognized as personal rights.

The Polish context is particularly fertile ground for an examination of this kind for several reasons, the first being its continental provenience, where the distinction between legislation and case law is clearly drawn: court opinions do not become law itself but show how the statutes work in practice. This allows one to examine discursive patterns in a dialectical relation between the law's formulation and the courts' interpretation. The second reason is the specific emotional dimension of this institution almost from its beginning, and to this day.

First of all, the Polish legal discourse in the recent years has seen a lively discussion of the problem whether a phenomenon that has a significant emotional component can be an object of legal protection, and even a personal right. This began with the question how civil law should treat the loss of a close, most often familial, bond. The debacle has attracted a lot of attention, concentrating the opinions of many prominent members of the legal scholars.<sup>24</sup> Up to 2008, any claims related to psychological damages resulting from the death of a loved one were based on Article 448 of the Civil Code<sup>25</sup> – the regulation which pertains to infringement on personal rights in general. A large part

<sup>23</sup> Only in extremely rare cases can damaged property be recognized as causing non-pecuniary, personal injury (example: damage of a family heirloom which is extremely important to an individual). Such a loss has to infringe on non-material interests.

<sup>24</sup> Opponents of recognizing familial bonds as personal rights included: B. Janiszewska, *Głosy w dyskusji w ramach panelu pierwszego* [Eng. *Voices in the discussion during the first panel*], in: M.J. Zieliński (ed.), *Studia i Analizy Sądu Najwyższego. Materiały Naukowe. Zadośćuczynienie na rzecz poszkodowanego w wypadku komunikacyjnym i na rzecz osób najbliższych* [Eng. *Studies and analyses of the Supreme Court. Academic Materials. Redressing the victim of a road accident and their next of kin/close relatives*], Warszawa 2017, pp. 80–81; M. Łolik, *Więź emocjonalna między osobami najbliższymi jako dobro osobiste. Głosa do uchwały siedmiu sędziów Sądu Najwyższego z 27.3.2018 r., III CZP 60/17* [Eng. *Emotional bond between the closest relatives. Commentary on a resolution of seven Supreme Court judges of 27 March 2018, III CZP 60/17*], "Przeгляд Sądowy" 2019/9, pp. 110–122; P. Machnikowski, *Art. 23. Ochrona dóbr osobistych* [Eng. *Article 23. Protection of personal rights*], in: E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Eng. *The Civil Code. Commentary*], Warszawa 2021, pp. 68–72; P. Szymańska vel Szymanek, *Więź rodzinna w orzecznictwie Sądu Najwyższego* [Eng. *Familial bond in the case law of the Supreme Court*], "Studia Prawnoustrojowe" 2019/45, pp. 335–348; M. Wałachowska, *Roszczenie o zadośćuczynienie pieniężne za zerwanie więzi rodzinnych w razie doznania przez osobę bliską poważnego uszczerbku na zdrowiu* [Eng. *Claim for redress for broken familial bonds if a close relative suffers considerable health impairment*], "Przeгляд Sądowy" 2017/9, pp. 11–25. And others for including familial bonds in personal rights, see B. Lackoroński, *Więzi rodzinne jako dobro osobiste – uwagi na tle wyroku Sądu Najwyższego z 9 sierpnia 2016 roku, II CSK 719/15* [Eng. *Familial bonds as a personal right: Remarks against the background of Supreme Court Judgment of 9 August 2016, II CSK 719/15*], in: M.J. Zieliński (ed.), *Studia i Analizy...*, pp. 89–107; T. Nowakowski, *Głosa do Uchwały składu siedmiu sędziów Sądu Najwyższego – Izba Kontroli Nadzwyczajnej i Spraw Publicznych z dnia 22 października 2019 r., I NSNZP 2/19* [Eng. *Commentary on resolution of a panel of seven Supreme Court judges – Chamber of Extraordinary Review and Public Affairs of 22 October 2019, I NSNZP 2/19*], "Orzecznictwo Sądów Polskich" 2020/5, pp. 3–46; K. Osajda, *Zadośćuczynienie za doznanie przez bliskiego uszczerbku na zdrowiu wskutek wypadku* [Eng. *Redress for a close relative suffering health impairment due to accident*], "Państwo i Prawo" 2016/1, pp. 73–86; G. Tylec, *Zadośćuczynienie za naruszenie dobra osobistego w postaci więzi rodzinnej. Uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka oraz orzecznictwa sądów polskich* [Eng. *Redress for infringement of a personal right in the form of family bond. Remarks against the backdrop of case law of the ECHR and Polish courts*], "Przeгляд Sądowy" 2018/3, pp. 7–22; M. Warciński, *Głosa do uchwały Sądu Najwyższego z 22 października 2010 r., III CZP 76/10* [Eng. *Commentary on Supreme Court resolution of 22 October 2010, III CZP 76/10*], "Palestra" 2012/1–2, pp. 101–107.

<sup>25</sup> Act of 23 April 1964 – Civil Code (consolidated text: Dz. U. 2022 item 1360 as amended).

of cases brought before the courts based on Article 448 concerned bereavement. This caused doubts whether the familial bond was a personal right that could be infringed on by death of a loved one. The debacle resulted in Article 446(4) being added into the Polish Civil Code on 3 August 2008. However, in Polish legal scholarship there was a lively discussion about whether familial bonds (or close relationships more generally) should be treated by law as a personal right. This discussion referred to many emotional topics and touched upon the degree to which close bonds are constituted by emotional attitudes and whether this has a bearing on considering them to be personal rights.

The opponents of the idea that family bonds are personal rights justify their stance mainly by referring to the construction of personal right as described in Polish scholarship. Leszek Bosek states that although familial and emotional<sup>26</sup> bonds are sometimes classified as a personal right, this is unacceptable, since “the feeling of attachment to loved ones can only enjoy compensatory protection under a specific provision of law”,<sup>27</sup> and this does not equate to the protection of a personal right. This stems from how Bosek defines personal rights: since they are “objectively existing, inalienable, socially-recognized values, closely related to each person, arising from their dignity, relating to their physical and mental integrity”, their existence cannot depend on other people and their attitude.<sup>28</sup> As personal rights are considered to be non-material values, embedded in the distinctiveness of an individual, they cannot be based on membership of a social group, even family;<sup>29</sup> moreover, as interpersonal phenomena, “emotional bonds are dependent on the will and even whim of a person, they fluctuate”.<sup>30</sup>

Meanwhile those legal scholars who support treating familial bonds as personal rights often use an *a fortiori* argument according to which, since the good name of a deceased person is protected by law as a personal right, the relationship between that person and bereaved kin should be protected even more.<sup>31</sup> Some scholars also point to the importance of family as a social value, recognized even by the Polish Constitution.<sup>32</sup> These arguments for recognizing familial bonds as personal rights, while practical in nature, are seen as counterarguments by the opponents of this solution, who point out that “courts’ opinions on familial bonds as a personal right result from the practical need to protect the interests of bereaved persons whose harm arose before Article 446(4) came into force”.<sup>33</sup> Teresa Grzeszak claims that “for achieving a short-term goal of compensating all persons bereaved before Article 446(4) came into force, a new

<sup>26</sup> The distinction between familial and emotional bonds in this case results from the fact that certain types of relationships that are not blood bonds or institutionalized family ties, yet are close affective bonds between people, have been recognized in case law. A prime example of this in case law is the relationship between fiancés, or divorced spouses (sic!), which, even though no longer within the confines of marriage, is characterized by affection.

<sup>27</sup> L. Bosek, *Art. 4. Zadośćuczynienie pieniężne za krzywdę* [Eng. *Article 4. Pecuniary redress for harm*], in: L. Bosek (ed.), *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz* [Eng. *The Act on Patients’ Rights and the Patients’ Rights Ombudsman*], Warszawa 2020, pp. 84–116, 101.

<sup>28</sup> L. Bosek, *Art. 4...*, p. 102.

<sup>29</sup> L. Bosek, *W sprawie kwalifikacji więzi rodzinnej jako dobra osobistego (uwagi krytyczne na tle aktualnego orzecznictwa Sądu Najwyższego)* [Eng. *On classifying a familial bond as a personal right (critical remarks against the background of current case law of the Supreme Court)*], “Forum Prawnicze” 2015/3, pp. 3–19, 6.

<sup>30</sup> L. Bosek, *W sprawie...*, p. 9.

<sup>31</sup> M. J. Zieliński, *Kwalifikacja więzi rodzinnej jako dobra osobistego a relacja art. 446 § 4 k.c. do art. 448 k.c.* [Eng. *Classification of a familial bond as a personal right in the context of relation of Article 446(4) to Article 448 of the Civil Code*], in: M. J. Zieliński (ed.), *Studia i Analizy Sądu Najwyższego...*, pp. 37–65, 43.

<sup>32</sup> G. Tylec, *Zadośćuczynienie za naruszenie...*, pp. 7.

<sup>33</sup> L. Bosek, *W sprawie kwalifikacji więzi rodzinnej...*, p. 4.

personal right was created: familial bond, which started an independent existence”.<sup>34</sup> Whether defined as a personal right or as an interest protected by specific legal regulation (Article 446(4) and Article 446<sup>2</sup>), the courts deciding about harm resulting from destruction of such bonds do examine their affective specificity (the kind and intensity of the emotional bond between people is taken into account and the amount of compensation depends on it).<sup>35</sup>

Additionally, the history of Polish civil law and its doctrinal interpretation carries certain affective connotations. Non-pecuniary harm was first written into Polish civil law as “moral harm” in the 1930s. Despite several legal amendments, this name, which alludes to the mental and emotional sphere of life, as well as axiological judgment, has persisted and features even in contemporary judicial and common language. Secondly, as Polish law compensates the injury to personal rights, the very definition of this term had an affective provenience. In 1985, Polish private law scholar Stefan Grzybowski described it in the following way:

The common characteristic feature of all personal rights is non-material, individual values of the emotional world, states of a person’s mental life. Protection of personal rights is defence against the violation of these very values. The object of protection is a human feeling, an undisturbed state of mental life.<sup>36</sup>

This, so-called subjective, conception of personal rights was later replaced by an objective one developed by Zbigniew Radwański, who conceptualized them as “legally recognized, highly esteemed values, encompassing physical and mental integrity of a person, their individuality and dignity and social standing, which allows for self-realization”.<sup>37</sup> Despite this change, elements of the subjective conception remain in court discourse to this day, and terms such as dignity and self-actualization are often connected with their emotional elements. Polish term “krzywda” translates to “a wrong” and has particular connotations with being unjustly hurt and the wrongfulness of the offender’s conduct. Although nowadays the definition of personal rights was rephrased in an objective manner (as important and socially recognized values), the connotations with emotions still function in language. The colloquial language still refers to moral loss when talking about liability for a traumatizing event. Polish legal regulations talk about compensation for the wrong “suffered”, “felt” by the person (Pol. “doznana” krzywda) and calls for adequate compensation. Finally, the rather broad and general phrasing of legal regulations pertaining to non-pecuniary harm created space for discretionary and creative judicial discourse, which has supplemented the legal discourse with several important lines of reasoning, also with regard to emotion.

### 3. The aims of the study

The purpose of this study is to expose the use of emotion-related language by Polish judges deciding on non-pecuniary harm. The language of judging, although to a large

<sup>34</sup> T. Grzeszak, *Dobro osobiste jako dobro zindywidualizowane* [Eng. *Personal rights as individualized rights*], “Przegląd Sądowy” 2018/4, pp. 7–41, 35.

<sup>35</sup> Judgment of the Supreme Court of 7 July 2017 (V CSK 609/16), Legalis No. 1640668.

<sup>36</sup> S. Grzybowski, *Ochrona dóbr osobistych wg przepisów ogólnych prawa cywilnego* [Eng. *Protection of personal rights pursuant to general provisions of civil law*], Warszawa 1957, p. 78; S. Grzybowski, *System Prawa Cywilnego, t. 1, Część ogólna* [Eng. *The system of civil law, vol. 1, General part*], Wrocław 1985, p. 297; T. Grzeszak, *Dobro osobiste jako...*, p. 9.

<sup>37</sup> Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna* [Eng. *Civil law – General part*], Warszawa 2015, p. 157.

degree similar to its everyday use, defines or uses some words in a particular way that changes their meaning. Similarly, references to emotions could be considered to be just a metaphor. To verify whether that is the case, a good starting point seems to be showing how often and to which emotions judges refer to when speaking about personal injury. A large-scale linguistic analysis will not only yield some preliminary results on scale and variety of such references, but also help pinpoint most important areas and problems for a future, deeper, qualitative study. The numerical, quantitative character of such a study allows to see trends and perhaps even causes for concern.

In this article I aim to show the scale and the variety of emotion-related terms in the courts' language using a linguistic and statistical analysis, and I attempt to ground the conclusions in psychological and philosophical knowledge. While references to emotions feature in Polish legal discourse, the doctrine so far tended to tackle this problem with in-depth, small-scale dogmatic analyses grounded in the mechanics of a legal institution (as was the case of familial bonds and personal rights, where analyses often focused on a chosen Supreme Court opinion). My ambition in this study is the opposite: I intend to conduct a large-scale, systematic and quantitative survey of what references to affective phenomena appear in case law. The results will be presented in the context of psychological knowledge and feature some limited quantitative findings enabling categorization of the function of emotional references in judicial discourse.

Some caveats must be made. Such a study will, by necessity, be broad and shallow, however my ambition is to present the variety of used language and its possible theoretical implications, rather than offering a complete understanding of the role of emotions in the legal institutions. The study is not dogmatic in nature as what interests me most fits more into the framework of general jurisprudence with a psychological twist. Secondly, it must be noted early on that while matters related to compensation, the amount of damages awarded to the plaintiff, and the possible role of emotions in determining them are an important issue, I do not undertake it in this study, which is focused on sheer magnitude and range of emotional references in the case law at the level of language used by courts. Such a study does not allow to draw linear conclusions between ways of reasoning about emotions and the resolution of court cases but is aimed at showing general trends across legal regulations and time, and maps out the presence of various affective phenomena in case law. Quantitative and qualitative research on damages in personal injury cases were conducted in the Polish context, e.g., by Ewa Bagińska and Jędrzej Kondek.<sup>38</sup>

Research questions concern mainly what emotion-related terms appear in the judicial opinions and how frequently – for each legal regulation and each year (as well as the whole period) – this happens; what function they may play in terms of the nature and purpose of the regulations on personal injury (how they are interpreted in terms of this law); can they be systematized; and what this phenomenon can mean in light of psychological knowledge of emotion and philosophical tenets of law.

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<sup>38</sup> See J.M. Kondek, *Naprawienie krzywdy wyrządzonej w wypadkach komunikacyjnych w świetle badań aktowych* [Eng. *Redressing the harm inflicted in road accidents in the light of case file study*], "Prawo w Działaniu. Sprawy Cywilne" 2021/46, pp. 47–90.

The following text is an attempt to describe the emotional landscape of Polish case law on non-pecuniary harm, focusing on the diversity of affective experience noticed by the courts. After describing the methodology, I present the results, grouped into two parts. The first, solely quantitative, part contains basic statistical data regarding the frequency and variety of occurrence of emotion-related terms in court decisions issued based on these regulations. The second part is an attempt at dividing prominent emotions according to the function they fulfill in the legal proceedings. I distinguish between two ways in which emotions in such cases become an object of interest of law: I propose that most prominent emotions are either protected or compensated. Relying on this distinction, I propose a preliminary taxonomy or typology of emotions appearing in Polish case law, discussing each emotion's role and its grounding in the legal context and frequency of appearance. Finally, I offer some more general conclusions regarding the role of emotions and psychology in tort law and its assumptions.

#### 4. Methodology

In order to map out the emotions in Polish civil law's institution of non-pecuniary harm, I analyse a collection of judicial opinions relating to pertinent regulations of the Polish Civil Code between 2008 and 2023, drawn from the Polish system of legal information Legalis.<sup>39</sup> I conduct a simple statistical analysis that allows for determining the frequency of mentions referring to various emotional states and drawing inferences about the visibility of emotions in Polish law. I supplement these findings with preliminary, selected, case-based qualitative data drawn from this set. My research questions focus on how law notices and protects emotions. In particular, I examine to what degree emotions feature in the corpus as the object of protection or are equated with harm, and I map out the kinds of emotions Polish judges connect with different legal regulations and with emotional objects like persons, values and mental disorders. I use semantic quantitative analysis, and partly also qualitative analysis, to reflect the emotion-related trends in the language of adjudication. This approach is in part inspired by other scholars' attempts to map out or typologize emotions with respect to, inter alia, criminalization of behaviour,<sup>40</sup> cultural construction of feelings,<sup>41</sup> or emotions as para-cognitive attitudes.<sup>42</sup>

The modern iteration of the so-called non-pecuniary harm (Pol. "krzywda") has been formulated within the frames of the Polish Civil Code from 1964, with major revisions, among others, in 1996, 2008, and 2021. The following table collates legal provisions which underlie claims concerning the non-pecuniary aspect of personal injury.<sup>43</sup>

<sup>39</sup> <https://legalis.pl/>, access: 22.06.2024.

<sup>40</sup> N. Peršak, *Pathways to the criminalisation of emotional distress: An offence- and harm-based typology*, "International Journal of Law, Crime and Justice" 2020/63, pp.1–12.

<sup>41</sup> L.F. Barrett, *How Emotions Are Made: The Secret Life of the Brain*, Boston-New York 2017, p. 2.

<sup>42</sup> I. Persson, *The Retreat of Reason: A Dilemma in the Philosophy of Life*, Oxford 2005, p. 79.

<sup>43</sup> Personal injury (Pol. "szkoda na osobie") can also trigger pecuniary (material) responsibility: for example, a victim of an accident may be awarded both damages for the cost of treatment, lost wages, medication etc. and compensation for pain, suffering, and loss of joy of life. The two kinds of damages, although both being a sum of money, have two distinct aims, functions and are awarded in different ways.

**Table 1.** Regulations of Personal Injury in Polish Civil Code taken into account in analysis.<sup>44</sup>

Article of the Civil code	Subject-matter
417 <sup>2</sup>	Infringement on personal rights by state authority (equity-based)
445	Infringement on health, sexual integrity, freedom
446(4)	Bereavement – loss of a loved one
446 <sup>2</sup>	Violation of family ties – inability to have a familial bond due to a life-changing injury
448	Infringement on personal rights in general (privacy, dignity, reputation etc.)

As was mentioned before, Article 446(4), which provides for compensation for the death of a loved one, was added in 2008 (this claim was previously covered by general personal rights protection in Article 448). The Civil Code defines non-pecuniary harm as an infringement of personal rights protected by Article 23, which include health, liberty, honour, freedom of conscience, name and image, privacy, authorship, and similar interests of an individual. The most recent amendment was the insertion, in 2021, of Article 446<sup>2</sup> dealing with compensation for violation of family ties. This regulation states that “in the event of severe and permanent bodily injury or infliction of a disorder of health, resulting in the inability to establish or continue a family relationship, the court may award the immediate family members of the victim an appropriate sum as monetary compensation for the harm suffered”.

The cases I analyse are therefore based on five articles of the Civil Code: Article 417<sup>2</sup> providing for compensation for non-monetary harm brought about by the state; Article 445, which covers claims related to deprivation of liberty, bodily harm, and sexual integrity; the newly introduced Article 446(4) pertaining to death of a loved one; Article 446<sup>2</sup> regarding a life-changing injury and subsequent inability to form a relationship, and Article 448 providing for the general protection of personal rights, which in practice means claims not covered by the previous, specific articles.

The data was collected based on court opinions issued from 3 August 2008 to 9 December 2023,<sup>45</sup> available in the legal information system Legalis. As was mentioned before, on 3 August 2008, paragraph 4 was added to Article 446 of the Civil Code, effectively creating a separate legal basis for seeking bereavement damages. By examining the data after this provision entered into force, I aim to provide a clearer distinction between legal provisions pertaining to personal injury, and, in consequence, between emotions that might be considered by courts as factors in different facts of cases. Since then, most cases involving bereavement have gravitated towards Article 446(4), which to an extent “frees up” Article 448 as the basis for claims concerning personal rights, and, hopefully, allows to notice different emotional patterns.<sup>46</sup> Previously, claims concerning loss of a loved one were “mixed up” with other cases regarding such issues as dignity, reputation or privacy, therefore I believe August 2008 to be an appropriate point for the beginning of my analysis. The data analysis cutoff point is 9 December 2023,

<sup>44</sup> In this article I am leaving out Article 446<sup>1</sup>, regarding the right to sue for prenatal harms, mainly because the harms that it concerns fall into the category of others listed here (usually Article 445, as lawsuits concerning compensation for prenatal harm).

<sup>45</sup> Data collection was conducted on 9 December 2023, based on what was available in the Legalis system at that date.

<sup>46</sup> Here it must be noted that the loss of a loved one which occurred before 3 August 2008 could be the subject of court proceedings based on Article 448.

the latest possible point before the finalizing this text. This allows me to get a glimpse into the freshest trends from 2023, although it is probably still too early to fully note the impact of Article 446<sup>2</sup>, added in 2021.

## 5. Results

### 5.1. Frequency (scale) and range (variety) of emotions appearing in court opinions

**Table 2.** The appearance of emotion-related terms in Polish case law on personal injury (Aug. 2008 – Dec. 2023)

Emotion	Art. 417 <sup>2</sup>	Art. 445	Art. 446(4)	Art. 446 <sup>2</sup>	Art. 448	Mentions total
Suffering	116	14,113	5,138	7	6,189	25,563
Pain	56	12,245	4,208	3	4,422	20,934
Feeling	26	4,844	2,250	5	2,497	9,622
Grief	3	1,101	3,682	1	2,761	7,548
Fear	20	4,454	1,319	2	1,343	7,138
Regret	4	1,169	2,542	3	2,085	5,803
Emotion	12	1,785	2,145	4	2,045	5,991
Sadness	5	993	2,466	4	1,889	5,357
Helplessness	19	3,742	914	4	1,014	5,693
Dignity	70	890	127	0	2,826	3,913
Joy	3	1,147	1,210	2	1,015	3,377
Trust	57	1,269	592	1	1,398	3,317
Closeness	7	600	1,481	6	1,001	3,095
Hope	5	646	939	3	767	2,360
Love	0	355	1,044	1	809	2,209
Anger	3	549	557	1	490	1,600
Humiliation	19	306	8	0	564	897
Shame	2	377	35	0	157	571
<b>Cases total</b>	<b>303</b>	<b>16,128</b>	<b>5,661</b>	<b>11</b>	<b>9,333</b>	<b>31,346</b>

Between August 2008 and December 2023, the terms “feelings” and “emotions” (Pol. “uczucia” and “emocje”) as well as their inflected forms appeared respectively in 9,622 and 5,991 out of the total sample of 31,436 court decisions issued based on all five legal provisions on non-pecuniary harm. This makes for 19.05% prevalence of the term “emotions” and 30.60% prevalence for the term “feelings” in the entire set of court opinions for all four articles.

It must be noted here that while I consider emotions and feelings to be synonymous throughout this work (as explained before), the actual analysis of case law includes both terms separately in the searches. The reasons for distinguishing between feelings and emotions during the analysis of case law are twofold. Firstly, Bogusław Lackoroński, a participant of the aforementioned debate on familial bonds, offered

a way to differentiate before emotions and feelings to defend the possibility of their protection. Feelings are supposed to be:

relatively permanent and complex attitudes towards reality, the essence of which is the feeling of a personal (although not always subjective) attitude towards a specific (recognized by the subject) object, in a relatively constant way (persisting despite a variety of reactions to *ad hoc* events associated with the object),<sup>47</sup>

while emotions were conceptualized as a way in which an individual adjusts their behaviour in reaction to stimuli of the world around them and their internal needs.<sup>48</sup>

The second reason for this distinction is mainly the Polish language use context. “Feeling” may be translated into Polish as “uczucie”, and “emotion” as “emocja”. The meaning of these terms is sometimes strongly separated, and sometimes they are considered to be synonymous. Although the Polish Language Dictionary lists “uczucie” and “emocja” as synonyms, it defines the former as:

(1) a synthesis of all emotional states, main motivator of human action, juxtaposed with logic and reason; (2) a mental state reflecting attitude to others, the world and oneself; (3) love, affection, friendship and passion directed at someone; (4) a physical sensation,<sup>49</sup>

and the latter as “a strong feeling caused by a situation”.<sup>50</sup> In the context of Polish courts’ opinions, the term “uczucie” may be used in its broader sense (sense (2) above), referring not only to emotional states, but also sensations and attitudes (a sense of justice, sensation of numbness etc.). Nevertheless, this broader set is also worth to be included in the data as courts often use it together with particular emotions (e.g., a feeling of despair, sadness, fear, etc.). The set of results based on the term “emotion” is noticeably narrower, which may be explained by the above factors, nevertheless courts also use them to denote various, named affective states (e.g., emotion of guilt, anger, regret, etc.). Therefore, the distinction between these terms serves only analytical clarity, rather than expressing beliefs about the nature of mental phenomena.

With respect to particular legal regulations, the greatest prevalence of emotional terms was in cases based on Article 446(4), which concerns the death of a loved one (“feelings” occurred in 39.75% and “emotions” in 37.89% of cases). As for Article 448, concerning general infringement of personal rights, “feelings” were referred to in 26.75% of cases, while “emotions” appeared in 21.91% of cases. While this shows a closely balanced proportion between the usage of both terms (often used synonymously in Polish), in case of Article 445, which concerns mainly bodily injuries, this difference is greater (in 30.03% of cases “feelings” were mentioned, while “emotions” in only 11.07% of them). Here, the difference could be explained by the fact that “feelings” are sometimes used in Polish to mean sensation, sensory perception (e.g., feeling of cold). Article 417<sup>2</sup> yielded only 303 cases, as it is rarely used, with negligible presence of emotion-related terms (8.58% for “feelings” and 3.96% for “emotions”), and Article 446<sup>2</sup>, due to its short presence in Polish law, yielded only 11 cases, in which 5 judgments referred to “feelings” and 4 to “emotions”.

<sup>47</sup> B. Lackoroński, *Więzi rodzinne...*, p. 95.

<sup>48</sup> B. Lackoroński, *Więzi rodzinne...*, p. 95.

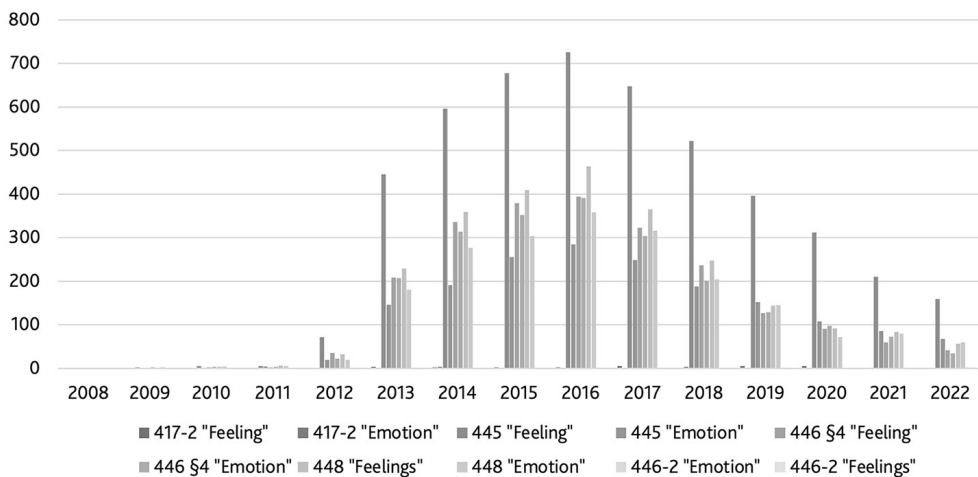
<sup>49</sup> <https://sjp.pwn.pl/slowniki/uczucie.html>, access: 22.06.2024.

<sup>50</sup> <https://sjp.pwn.pl/slowniki/emocja.html>, access: 22.06.2024.

However, the above numbers can be even higher in cases of particular emotions or expressions of emotionality, with special prevalence of terms such as “grief” (in Polish “żałoba” with 3,682 cases based on Article 446(4), and 2,761 cases on Article 448, which surpasses the number of mentions of either “emotions” or “feelings”). Moreover, the overall frequency of occurrence of the term “suffering” is striking – it appears in 81.32% of all cases (25,563), which points to it being an umbrella term for various kinds of mental and physical ailments. Although not strictly an affective phenomenon, “pain” is also a ubiquitous term, with more mentions than “feelings” or “emotions” across the categories: it has 56 mentions for Article 417<sup>2</sup>, 12,245 for Article 445, 4,208 for Article 446(4), and 4,422 for Article 448.

The frequency of occurrence of terms connected with emotions changed over time. Figure 1 presents the number of court opinions that mention “feeling”, “emotion”, or particular affective states broken down by years. The overall number of mentions in the period gradually increased, peaking in 2015 and 2017 for Articles 445 and 448 (respectively, 2,051 and 1,237 for “feelings”, and 778 and 978 for “emotions”). This peak dissipated after 2018, gently falling but not returning to pre-2012 levels. To compare, in 2009–2012, the number of mentions for both “feelings” and “emotions” did not exceed 100 in total for all available articles. For Article 446(4), the peak occurred earlier, in 2014–2016, with 394 mentions of “feelings” and 391 mentions of “emotions” in 2016. These results confirm the significant role of emotions in the cases related to harm. The use of emotional language extends to more than every fourth case, and this prevalence seems to increase with time.

**Figure 1.** Number of mentions of “feeling” and “emotion” in court opinions issued between 2008 and 2023



Visibly, the number of mentions for emotion-related terms has been insignificant until 2012, then increased severalfold for each following year, peaked between 2015 and 2017 and then in 2018–2019 slowly petered out to levels observed in 2013. Since 2020 it started falling further and in 2023 it seems to have returned to the level recorded in 2012, however caution must be maintained with such observations as new cases keep being added to electronic legal information systems. An examination would have to be repeated. While there is no single explanation for this rise in frequency of referrals to emotions, one hypothesis

that might explain it to some degree is that until 2012 there was a low number of cases related to non-pecuniary harm overall. With the increase in the number of cases arriving before them, the courts could start “picking up” from each other the way of defining, evaluating, and assessing non-pecuniary harm. The snowball effect for each year may be explained by the inspiration courts drew from previous years to solve new cases that arose. The disproportionate peak of mentions between 2015 and 2017 is puzzling and not easily explainable without a broader, empirical, qualitative study which would compare and catalogue patterns of reasoning and topics, which is beyond the scope of this preliminary article.

However, the gathered data seem to confirm the assertion that Polish civil law at that time skewed towards noticing and rewarding more and more emotions. Polish legal scholars critically referred to this process as trying to protect feelings from being hurt. It can be conceptualized as law providing an ever-higher level of protection of mental wellbeing over time. In 2018, Grzeszak very aptly pointed out unsettling tendencies in civil law courts: firstly, she noticed a blurring between human rights and personal rights, resulting from courts tending to protect the “general wellbeing and wellness of a person”, without carefully checking if a personal right was infringed.<sup>51</sup> Secondly, as Grzeszak pointed out, “it is easy for a judge to identify the causing of suffering with the violation of a personal right and award some compensation” but it is harder to justify why a plaintiff is *not* entitled to compensation, “even more so when judgments awarding compensation in similar factual situations are known”.<sup>52</sup> Judicial empathy may be a factor which demands studying, especially in the times of – seemingly – growing sensitivity and awareness about psychology and mental health, which may manifest themselves in broadening the scope of protected interest with time. Two notable examples of new quasi-personal rights which already found their way into case law is the right to be free from fear connected with polluted environment and city smog, and emotional bonds with one’s pet animal.

## 5.2. Typology of emotions appearing in court opinions

Below, I present an outline of the variety of emotions of which Polish case law has taken note, displaying the frequency with which each emotion or affective phenomenon appeared.

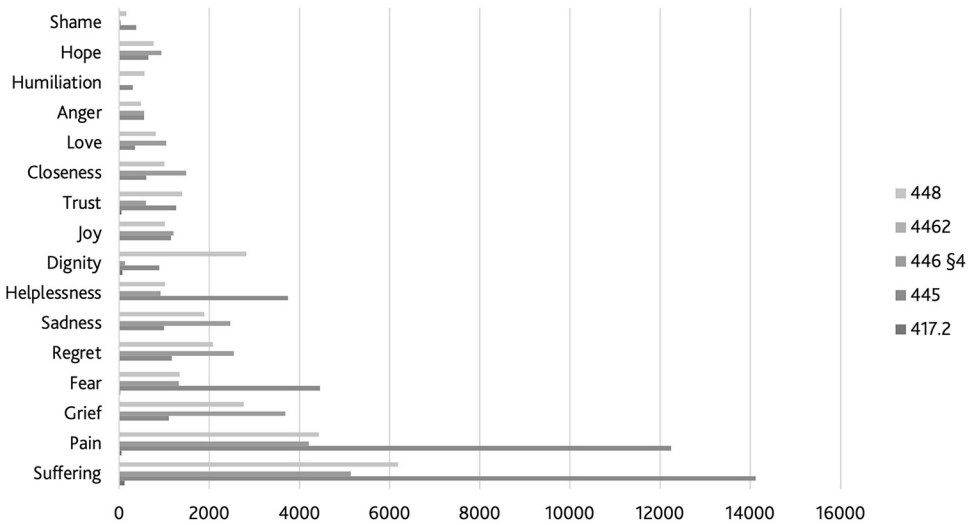
The scale and variety of emotions appearing in Polish case law on personal injury demand a closer look at the role they play in determining legal liability. The following typology aims to place prominently featuring types of emotions in an appropriate regulatory context and offer preliminary explanation on how they play into judicial reasoning on non-pecuniary harm. Such a typology, however, must take into account several caveats.

Firstly, the nuanced understanding of emotional life and the variety of emotional states mentioned in courts opinions mean that any categorization is generalized and encompasses only the most prominent types of emotions. To distinguish such types I follow the linguistic frequency of particular emotions as the signpost of relevance that directs the qualitative analysis. Secondly, the judges who prepare court opinions tend to imbue particular emotions with varied meanings and measures of significance in the legal proceedings. The goal here is to identify a general principle which may be used to distinguish their roles. Thirdly, psychological knowledge directs the considerations about which sorts of emotions should be most closely examined.

<sup>51</sup> T. Grzeszak, *Dobro osobiste jako...*, p. 19.

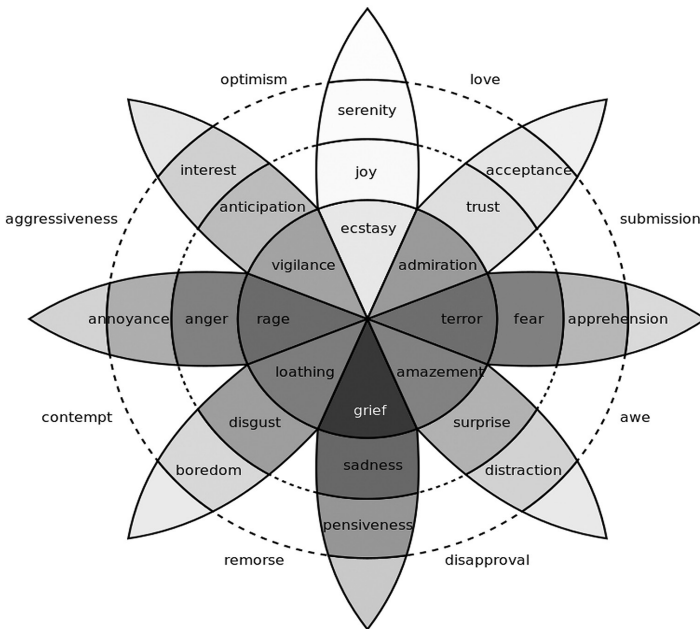
<sup>52</sup> T. Grzeszak, *Dobro osobiste jako...*, p. 31.

**Figure 2.** Frequency of appearance of different emotion-related terms in case law



The following typology was created through confronting case law patterns with classic typologies of emotions created by Paul Ekman and Robert Plutchik<sup>53</sup>.

**Figure 3.** Plutchik’s wheel of emotions<sup>54</sup>



<sup>53</sup> P. Ekman, W.V. Friesen, *Constants across cultures in the face and emotion*, “Journal of Personality and Social Psychology” 1971/2, pp.124–129; R. Plutchik, H. Kellerman, H.R. Conte, *A structural theory of ego defenses and emotions*, in: C. Izzard (ed.), *Emotions in Personality and Psychopathology*, Boston 1979, pp. 227–257.

<sup>54</sup> Image in public domain, retrieved from [https://en.wikipedia.org/wiki/Robert\\_Plutchik#/media/File:Plutchik-wheel.svg](https://en.wikipedia.org/wiki/Robert_Plutchik#/media/File:Plutchik-wheel.svg), access: 22.06.2024.

This was done to ensure that the emotions appearing in court opinions are differentiated from one another in a meaningful manner. Due to the focus of regulations of harm on certain emotional states rather than others, some emotions from classic typologies do not appear in the texts of court decisions and vice versa. Building on these typologies, I distinguish nine emotions which fulfill all of the conditions, that is, ones which: (1) appear in court judgments with sufficient frequency, (2) have either positive or negative valence (e.g. surprise or amazement cannot be said to be positive or negative), and (3) are considered an object of harm both explicitly and specifically (e.g. the emotion of sadness features in many cases of harm but is never a sufficient basis for compensation itself).

Ekman distinguished six basic types of emotions: happiness, sadness, fear, anger, disgust, and surprise, later supplementing them with amusement, contempt, contentment, embarrassment, excitement, guilt, pride in achievement, relief, satisfaction, sensory pleasure, and shame.<sup>55</sup> Plutchik listed eight primary emotions – anger, fear, sadness, disgust, surprise, anticipation, trust, and joy.<sup>56</sup> As we can see, the data mined from the Polish case law on personal injury follows these distinctions to some extent. Of course, not every emotion appearing on the diagram will be considered an object of protection or a measure of harm by Polish courts, and, conversely, Polish courts do note some emotions like regret, humiliation, or helplessness, that are not grasped in this model.

Emotions that are described above appear to function in one of two roles: they either entail compensation when they occur due to unlawful causes (like grief, humiliation, and fear), or their disruption warrants legal intervention (like affection, satisfaction, and trust). It is important to notice that this sometimes puts two emotions as different sides of the same coin, with one being treated as the protected right or interest and the other as the sign of breaching it (or parts of either a personal right, interest, or harm).

### 5.2.1. Emotions and feelings that law protects through regulation of non-pecuniary harm

Among the affective states to which Polish courts assign significance, some appear to be directly protected by law. The role of law in protecting emotions and feelings is a subject of debate in Polish scholarship (Lackoroński, Jastrzębski, Grzeszak), however a closer look at court opinions allows one to explicate which emotional states are desired by law, and an injury to them constitutes a harm. This is visible when courts take steps to grasp the qualities of emotional experience relevant to harm and evaluate its size and authenticity in order to translate it into legal reasoning. Feelings protected by non-pecuniary harm regulation are seen as the affective correlates of personal rights, and perhaps something similar to rights themselves. The courts acknowledge the necessity of certain basic, positive feelings, for a person's wellbeing, and – similarly – they interpret the unlawful privation of these mental states as harm.

#### 5.2.1.1. Love

While there is no abstract right to love, this emotion is noticed and protected by Polish courts as its destruction is known to cause personal injury. This interpretation can be

<sup>55</sup> J. Prinz, *Which emotions are basic*, in: D. Evans, P. Cruse (eds.), *Emotion, Evolution, and Rationality*, Oxford 2004, pp. 69–87.

<sup>56</sup> R. Plutchik, H. Kellerman, H.R. Conte, *A structural theory of ego defenses and emotions...*, p. 254.

traced to case law which has repeatedly suggested that cultivating emotional ties and family relationships should be considered a personal right. Polish courts protect the feeling of love (and similar feelings of affection, closeness, friendship, and intimacy) through assigning liability to a person who prematurely and wrongfully terminated such a relationship. This mainly concerns cases of bereavement (Article 446(4)) – courts recognize the harm resulting from destruction of a close relationship and include in it not only the negative feeling of grief, but also loss of positive emotional states, such as loving and feeling loved, enjoying intimacy, support, and security. While cases concerning the death of a loved one are very frequent, the protection of love is not limited to them. It is also considered to constitute harm when a loved one becomes unresponsive as a result of vegetative state brought about by an injury, as the existence of close emotional ties is no longer possible (this injury is covered by Article 446<sup>2</sup>). Although, technically, the person in question is alive, they are unable to communicate, show affection, exchange thoughts, or cultivate physical intimacy. The affection that Polish courts notice and protect must therefore meet a certain standard: it should be reciprocal, lasting, and authentic. Courts verify the veracity and closeness of emotional ties by examining family history, narration about the deceased loved one, and emotional displays that feature in testimony.

#### 5.2.1.2. Satisfaction

Polish civil law protects the right of an individual to enjoy their life and not be unjustly deprived of satisfaction from it. This extends to the ability to share it with a beloved person but also to enjoy various pursuits that life has to offer. When applying the regulations in bereavement cases (Article 446(4)), courts take into account the “loss of joy of life” that comes with the death of a loved one. This loss is considered to be a part of non-pecuniary harm.<sup>57</sup> Harm consisting in loss of joy or satisfaction from life occurs also due to damage to health or physical injuries (Article 445(1)). The Civil code recognizes a personal right to health, but what is protected is not only a certain bodily state, but the capability to enjoy life that comes with it. Polish courts recognize that physical comfort, ability to enjoy work and various passions, including sports, and to feel good about one’s appearance are important components of mental wellbeing.<sup>58</sup> This has the greatest impact in cases of people who were injured at the brink of their adult life, which put limits on what sorts of endeavours they might pursue.

#### 5.2.1.3. Trust<sup>59</sup>

In court judgments on non-pecuniary harm, trust appears as a protected emotion in two ways. Firstly, harm may consist in breaching the faith of the plaintiff in the public

<sup>57</sup> Judgment of the Court of Appeal of Łódź of 20 February 2014 (I ACa 1136/13), *Legalis* No. 804591.

<sup>58</sup> Judgment of the Court of Appeal of Warsaw of 7 July 2015 (VI ACa 1105/14), *Legalis* No. 1393111.

<sup>59</sup> Although the status of trust as an emotion is an object of discussion in the philosophical and psychological literature. See R. de Sousa, *Epistemic Feelings*, “Mind and Matter” 2009/7(2), p. 139–161. I have decided to include it in my taxonomy of emotion for two reasons: first, because the Polish courts treat it as a mental state that they describe as “the feeling of trust” (Pol. “poczucie zaufania”) which they connect with sense of security and treat it as a desired and protected state with a decisive affective component juxtaposed with fear, anxiety and avoidance, and important for mental wellbeing. Secondly, Plutchik, whose theories I use as a backdrop in the analysis, explicitly lists trust as one of the eight primary emotions. The main argument why trust should not be treated as an emotion is its highly cognitive content, but the theories of emotions which support seeing them as intentional accommodate it.

institutions. This concerns mostly the loss of trust that follows non-material injury caused by state authorities (Article 417<sup>2</sup>). Frequent examples of this include mistreatment by state authorities, including grossly negligent treatment, or inadequate treatment of prisoners during incarceration. Polish courts consider these kinds of incursions as particularly heinous, because state authorities have a special duty to observe law and exercise care. This duty stems from the rule of trust of citizens towards the state.<sup>60</sup> In a sense, a duty of special care extends to public trust professionals even if they are not a part of the state apparatus. The most prominent example of this are medical professionals, whose mistakes in treatment and procedure not only cause bodily harm but also cause the harmed individual to lose trust in them (Article 445(1)). The second way in which tort law protects trust is that it recognizes harm done to a person who enjoyed special trust of the community as a journalist, academician, or a local politician (e.g. a mayor), but lost it due to defamation.<sup>61</sup> Courts recognize that slander campaigns and damage to reputation cause the community to view a person as unreliable and morally corrupt, which – even after favourable outcome of the lawsuit – causes a loss of trust that is often impossible to rebuild (this type of injury is covered by Article 448).

#### 5.2.1.4. Dignity

While dignity is not an emotion *per se*, the following consideration refers to a “feeling of dignity”, a psychological perception of one’s situation that is noticed both by Polish courts, which use the term “feeling of dignity”, and “feeling of self-worth”, and by scholars.<sup>62</sup> While dignity as an abstract goal is considered to be a value written into law at the highest level (in the Polish Constitution), civil law courts concretize it into a psychological state experienced by an individual. There is a disambiguation between the self-related feeling of dignity, which concerns the plaintiff’s opinion of themselves, and respect of others (reputation).<sup>63</sup> The aspect of dignity that corresponds to self-respect is harmed while being subjected to debasing and humiliating treatment. The protection of this basic level of self-esteem is granted to everyone, even during detainment by state.<sup>64</sup> The “external” aspect of dignity is what, according to courts, enables individuals to demand respect from others.<sup>65</sup> This aspect is most often thwarted due to defamation (Article 448; if done by state authorities, Article 417<sup>2</sup>). It has to do with a distinct persona that others perceive: dignity concerns not only physical or mental integrity, but also the individuality of a person, the feature that makes them distinguishable from others and recognizable. Dignity understood in this manner is connected by courts to other life pursuits that it enables: cultivating relationships, developing one’s personal brand, and advancing professionally, as well as being recognized as a reputable member of the community.

<sup>60</sup> Judgment of the Court of Appeal in Szczecin of 14 February 2013, Legalis No. 121379.

<sup>61</sup> Judgment of the Regional Court in Poznań of 20 July 2017 (XVIII C 1496/16), Legalis No. 2116502.

<sup>62</sup> D. Badcott, *The basis and relevance of emotional dignity*, “Med Health Care Philos.” 2003/2, pp. 123–31; A. C. Pelsler, *Respect for Human Dignity as an Emotion and Virtue*, “Res Philosophica” 2015/4, pp. 743–763; K.M. Fierke, *Human Dignity, Basal Emotion and a Global Emotionology*, in: L. Åhäll, T. Gregory (eds.), *Emotions, Politics and War*, London 2015, pp. 45–57.

<sup>63</sup> Judgment of the Court of Appeal in Warsaw of 20 September 2012 (I ACa 201/12), Legalis No. 730792.

<sup>64</sup> Judgment of the Court of Appeal in Szczecin of 17 December 2015 (I ACa 749/15), Legalis No. 1450821.

<sup>65</sup> Judgment of the Court of Appeal in Warsaw of 2 January 2019 (VI ACa 1209/17), Legalis No. 2243413.

### 5.2.2. Emotions and feelings that law compensates for through regulations on non-pecuniary harm

Certain negative emotions, when they arise due to relevant causes and with sufficient intensity (aside from mere nuisance), are considered to be harm. These emotions fit under the umbrella term of “mental distress”, which places them in context similar to American lawsuits concerning pain and suffering. Emotions understood in that way are directly related to an injury to personal rights and courts often deduce that harm occurred when they assess the experience of mental suffering. To grasp the full extent of emotional damages, courts synthesize personal factors (age, personality type, individual sensitivity, support network, etc.) with those concerning the injury itself (how graphic and unexpected it was, how many spheres of life it influenced, how intense emotions it provoked, etc.). Thus described emotions are distinguished by their negative valence and law attempts to compensate them by counteracting them with positive feelings related (in the eyes of courts) to economic gains.

#### 5.2.2.1. Grief

Grief features as one of the most dominant emotions appearing in court opinions concerning non-pecuniary harm, widely considered by judges as the most expressive sign of the immaterial damage entailed by the unlawful death of a relative (covered directly by Article 446(4) of the Civil Code). However, compensation is granted for the genuine and substantial personal experience of grief, and its amount is proportional to the amount, duration, and intensity of distress. Courts define grief as constituted from several different emotions, among them sadness or anguish, despair, emptiness, the state of missing someone, etc. It also includes references to other emotions such as shock, numbness and fear (anxiety). Although, to some degree, grief following the loss of a loved one is a shared, common emotion (much like love and closeness), courts take great efforts to establish the peculiarity of each grief. They pay attention to the special role the deceased had in the family, the habits and rituals that were particular to a bond and distinguished it from others, as well as how long the deceased and the bereaved have known (or could have known) each other.<sup>66</sup> While accounting for the emotion of grief as non-pecuniary harm, the courts often include in their considerations the effect it had on mental health: psychological illnesses and disorders often follow death of a loved one. Most prominent is the prolonged or complicated grief disorder, which poses the questions about what is “normal” and “excessive” when it comes to grieving a loved person, and how to source knowledge about this distinction (mental health professionals are often engaged as expert witnesses).

#### 5.2.2.2. Fear

Fear is mentioned as a composite of harm in a number of cases, based on all four legal regulations of non-pecuniary harm. Firstly, fear features as one of the emotions arising as part of bereavement (where a person loses not only a loved one, but also the general feeling of safety). Secondly, fear is considered to be the counterpart of loss of trust when people have been mistreated by state officials or medical professionals.

<sup>66</sup> Judgment of the District Court in Slupsk of 17 March 2017 (I C 2126/15), Legalis No. 2014248.

As non-pecuniary harm and the damages that are awarded for it concern the total amount of suffering one has endured, courts acknowledge not only the fear felt directly during the injury (e.g. an accident or assault), but also the continued, less sharp fear that persists afterwards. It is often mentioned that people who lost a loved one gain a persistent fear of death and start exercising an excessive degree of caution and care. People who have been failed by medical professionals or public institutions often start to avoid similar encounters out of fear, which can lead a person to avoid police or medical treatment even when help is needed. In stalking, abuse or defamation cases, the judiciary acknowledges that victims often spend the rest of their life looking over their shoulder and awaiting another blow from one's stalker abuser, or someone who may look to tarnish their reputation again. All these lasting effects of fear, in addition to the immediate trauma, are compensated accordingly.

#### 5.2.2.3. Humiliation and shame

Humiliation and shame are negative feelings recognized by Polish courts as part of injury to, respectively, self-related feeling of dignity (self-esteem) and its external aspect (reputation). Polish law recognizes that humiliation may be brought about through a debasing treatment of an individual, often perpetrated by state authorities. Courts define humiliating treatment as one "aimed at inducing feelings of fear, anguish or inferiority in the victim, resulting in humiliation and debasement intended to break their physical and moral resilience".<sup>67</sup> A frequent example is a plaintiff suing for the indignities they have endured in state prisons, such as degrading living conditions or abuse by correction officers (Article 417<sup>2</sup>). Shame, on the other hand, concerns an injury to a person's image (also self-image), or reputation, which lowers the social status of the affected person in the eyes of others. Actions that cause it include, for example: leak of private information, defamation (Article 448), but also disfigurement as a result of medical malpractice (Article 445(1)). Polish courts recognize that shame, similarly to fear and loss of joy, can prevent a person from leading a flourishing life.

#### 5.2.2.4. Helplessness

It appears that Polish courts perceive helplessness as apparent inability to cope with adverse situations. Courts recognize the feelings of helplessness that accompany many kinds of trauma. Witnessing an accident of a loved one or an immediate aftermath without being able to save them is noticed by courts as part of suffering experienced due to an unlawful injury. The courts pay special attention to situations when someone directly observed the accident and was physically present at the site but unable to prevent the death or less immediate feelings of helplessness like these accompanying seeing one's name slandered in a smear campaign but not being able to stop the publications or rumors fast enough. Helplessness itself also seems to feature in Article 445 of the Civil Code, which proscribes compensation not only for bodily injury or damage to health, but also for deprivation of liberty and inducement by deception, rape, or coercion to submit to a sexual act. The courts recognize the debilitating effects of being helpless in these situations, such as persistent feelings of anger, frustration, and guilt.

<sup>67</sup> Judgment of the Supreme Court of 28 July 1997 (II KKN 313/97), *Legalis* No. 31426.

## 6. Conclusions

The above typology enables identifying a common theme in court decisions related to non-pecuniary harm: courts consistently approach emotions as phenomena that are important to law. Rather than being treated as a mere linguistic convention or a placeholder for more tangible claims, emotions appear in judicial language on a large scale, and the mentions of them are diverse. It is apparent that, to a degree, they are factors in legal proceedings, serving as either protected interests or measurable harm (or parts of either). It is possible to point to more and less “emotion-saturated” places in the legal regulations and even over time in Polish case law. Similarly, a variety of emotional experiences can be mapped out to different regulations, topics, values, and interests. However, if Polish courts see as their task compensating or protecting emotions, serious dogmatic consequences must be studied.

The relevance of emotions for harm is problematic in light of legal theory’s dismissal of affective states to date. For a long time, feelings were considered by both doctrinal scholarship and jurisprudence as superfluous and ephemeral states, the law was expected to put them aside or even explicitly ignore their influence.<sup>68</sup> If the impact of emotion was already problematic for feelings found “between the lines” of legal process (in evidence law or affective states of legal actors), how difficult may it be to accommodate emotions explicitly considered an object of legal protection? One way out of this dilemma is through noticing a difference between emotions as traditionally imagined in jurisprudence and the way in which Polish courts see them. In the traditional view, emotions, conceived as animalistic, irrational and passing impulses were contrasted with reason that dominated and governed law. Polish case law of non-pecuniary harm shows a more complex view of emotionality, which enables correlating feelings to legal concepts and integrate them into legal reasoning.

The distinctions of various kinds of emotions appearing in judicial discourse partially overlap with distinctions of psychological models of emotions. Moreover, the very way in which courts seem to conceptualize the emotion process is similar to one introduced in literature: “emotions” and “feelings” relevant to law, as courts note, are imbued with meaning resulting from their intentional content: a state (such as health or happiness), a person (partner or family member), a value (such as dignity) or an object (like one’s reputation). These states and values are often already present in law, constituting or being related to personal rights. Moreover, courts pay attention to how emotions constitute valid reactions to a situation, and how they influence the whole mental and even physical state of a person, emphasizing their embodied nature. Since one of the basic tenets of Polish tort law is that an injury must be compensated in full,<sup>69</sup> the courts cannot ignore these feelings but must try to assess them in terms of injury that has a certain cause and scope and entails liability.<sup>70</sup> When Polish courts define the vague concept of non-pecuniary harm as mental suffering and negative emotions arising from violations of rights, they integrate feelings into legal mechanisms of causality, responsibility, and compensation, and notice their social and embodied dimension. This is similar to how Feldman-Barrett describes the emotion process: according to her,

<sup>68</sup> D.M. Kahan, M.C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, “Columbia Law Review” 1996/2, pp. 269–374.

<sup>69</sup> M. Kaliński, *Szkoda na mieniu i jej naprawienie* [Eng. *Damage to property and repairing it*], Warszawa 2014, p. 19.

<sup>70</sup> Judgment of the Regional Court in Gdańsk of 21 March 2017 (III Ca 145/17), Legalis No. 2007105.

emotions are “content-rich events”, which are underlain by neurological processes, but also mediated by the psychological understanding, and dependent on the social context. At their core, Feldman Barrett believes, an emotion can be described as “a contentful state of pleasure or displeasure”.<sup>71</sup> Fundamental to this understanding is the dichotomy between positive and negative affect, which is also how Polish law on personal injury seems to approach lasting emotional states. Appropriately justified, displeasure can trigger law’s reaction in the form of compensation, and contentment may be protected as part of an important value.

How do courts correlate feelings with protected rights? To say that protection of emotions is simply a result of injury to personal rights does not explain how this connection works. In order to explain it, one needs to look into the reasoning that allows Polish courts to proceed from emotion to law. Such a connection is offered by the mediating concept of interests, which are a core building block for most prominent theories of harm, authored, among others by John Kleinig who understood harm as “the impairment of a being’s welfare interest”<sup>72</sup>, and by Joel Feinberg, who considered harm to be an indefensible (inexcusable and unjustifiable) setback to interests that is also a violation of a person’s right.<sup>73</sup> Feinberg distinguished between welfare interests – a minimal level of physical, economical and mental comfort, and ulterior interests – more advanced goals related to satisfaction of professional and personal ambitions. He explicitly lists “emotional stability” and gives an example: an injury done to a child sets back the interest of a loving parent by causing a disruption of emotional stability, which threatens the achievement of more ultimate goals of that parent.<sup>74</sup> According to Feinberg, in general a person has an interest in X when he stands to gain or lose depending on the condition of X. To have an interest in something is to have a stake in the wellbeing of this thing, in a similar sense that a stockholder has an interest in the condition of the company. When the company flourishes, so does the stockholder, and when it wilts, the stockholder also loses. The well-being of objects of interest is therefore directly connected to one’s own.<sup>75</sup>

When Polish courts correlate emotions with injuries to personal rights, they not only display a similar conception of harm to Feinberg’s, but also, they display a vision of emotions that bears resemblance to contemporary, evaluative theories of emotions. Especially prominent in this regard is the work of Martha Nussbaum, who, in her work *Upheavals of Thought* described the connection between a person and what can be called interests (things, people, and states of affairs important to that person), in emotional terms. She calls emotions “geological upheavals of thought”, defining them as “judgments in which people acknowledge the great importance, for their own flourishing, of things that they do not fully control – and acknowledge thereby their neediness before the world and its events”.<sup>76</sup> The things that are needed for a person to flourish but are outside a person’s control in a sense that they may be advanced, suppressed or destroyed by others’ action can be considered interests in Feinberg’s sense. Objects of emotional reaction are those things that a person needs from the environment and

<sup>71</sup> L.F. Barrett, B. Mesquita, K.N. Ochsner, J.J. Gros, *The Experience of Emotion*, “Annual Review of Psychology” 2007/1, pp. 373–403.

<sup>72</sup> J. Kleinig, *Crime and the Concept of Harm*, “American Philosophical Quarterly” 1978/1, p. 27.

<sup>73</sup> J. Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, New York 1984, p. 33.

<sup>74</sup> J. Feinberg, *The Moral Limits...*, p. 71.

<sup>75</sup> J. Feinberg, *The Moral Limits...*, pp. 33–34.

<sup>76</sup> M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, New York 2003, p. 100.

has a stake in because their condition is in direct relation to that person's well-being. According to Nussbaum, an emotional reaction tells us that an important value or goal is being harmed, placed at risk, or advanced, thus telling us much about the stake in it. Nussbaum supplies this with an example – the grief and shock she experienced as a reaction to news about her mother's passing prove that her mother was important to her own flourishing – or, in Feinberg's terms, she had an interest in the wellbeing in her mother, an emotional stake in it.<sup>77</sup> On the grounds of Polish civil law, these interests may be considered as personal goods, in which a person has an important emotional stake: health, family, privacy, wellbeing, and lack of pain or anxiety. An incursion on these goods provokes an emotional reaction, which is taken to be a measure of harm, and the emotional investment in a stake is what Polish law considers to be an object of protection. It is in this sense that Nussbaum's vision of "geological upheavals of thought" can be supplied with a topography of how the institution of law addresses particular feelings with relation to interests and values.

### **The Scale and Diversity of References to Emotion in Polish Case Law on Personal Injury**

**Abstract:** This article is intended as a systematic, quantitative study of the occurrence of emotion-related terms in the discourse of Polish case law on personal injury. My purpose is to show the scale (prevalence) and range (variety) of references to terms related to feelings and affect in the decisions of Polish courts, and to compare this data with rudimentary psychological nomenclature. I am interested not only in how often Polish courts refer to affective phenomena in general, but also how they distinguish various kinds of emotions and, to some extent, what role they assign to them in their reasoning about personal injury. This data is placed in the context of basic psychological models. This is supplemented by preliminary remarks on what roles most notable emotions fulfill, aiming at creating a rudimentary taxonomy of emotions in Polish case law on personal injury. In this way the study aims to answer the questions whether Polish courts notice emotions while adjudicating on non-pecuniary harm, what range of emotions they refer to, and how this data shows the perceived function of affect-related terms in case law. In short, the aim of this article may be described as drawing up a tentative "map" of the affective legal terrain, as well as a taxonomy of functions that emotions may play in personal injury law.

**Keywords:** Law and Emotion, civil law, emotions, tort law, Polish law, non-pecuniary harm, damages

<sup>77</sup> M. Nussbaum, *Upheavals...*, p. 85.

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