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RHODIAN LAW AS A PROTOTYPE OF THE CLAIM FOR DAMAGE SUFFERED IN ANOTHER PERSON'S INTEREST IN POLISH CIVIL LAW

Introduction

Roman law contains numerous universal, supranational and timeless elements, which have largely contributed to its global reach (Sójka-Zielińska, 2010, 35–36). Therefore, the reception of solutions from Roman law is not surprising. It turns out, however, that Romans also recoded well-functioning legal institutions. The intensity of Greek influence on Rome before mid-fifth century BC is extremely clear in religion, arts and crafts and trade. This influence in many fields was indeed intense, but it would be dangerous to infer that there was also an influence on Roman law (Watson, 1993, 27). With regard to maritime law, the subject of reception was the Rhodian law on jettison, which was subsequently transplanted into other legal orders¹, including Polish law, and became a prototype for the Polish regulation stipulating the possibility of demanding compensation for loss suffered in someone else's interest. In this paper, I will discuss how the Rhodian Law become a part of Roman law. I present origin of common average and compare the regulations of *lex Rhodia de iactu* in Roman law with the Polish construction of loss suffered in another person's interest. I do so to demonstrate that Rhodian law is a prototype of claim for damage suffered in another person's interest in Polish civil law – regulation, which is hardly ever applied in practice, which should constitute the significant form of the legal protection inducing for undertaking the mutual civil concern.

¹ The rules of Lex Rhodia also influenced the content of the regulation in ABGB, Roman-Dutch Law.

Reception of the *lex Rhodia* rules into Roman Law

In ancient times, the domain of maritime law – with some exceptions – was ruled by customary law of the sea. But that era ended when Romans adopted the maritime law of Rhodes. This fact is very forcibly evinced in the rescript of emperor Augustus, contained in Book XIV, Title 2, Section 9 of the Digest of Justinian. The text is in Greek and was included in the Digest from the particular act known as *lex Rhodia* (Dareste, 1905, 1–29.), written probably around the middle of the second century A.D. by the Roman jurist L. Volusius Maecianus.² The text he drafted was incorporated into the Digest with the following wording:

D. 14.2.9. *Id est: Petitio Eudaemonis Nicomedensis ad imperatorem Antoninum: Domine imperator Antonine, cum naufragium fecissemus in Italia [immo in Icaria], direpti sumus a publicis [immo a publicanis], qui in Cycladibus insulis habitant. Antoninus dicit Eudaemoni. Ego orbis terrarum dominus sum, lex autem maris, lege Rhodia de re nautica res iudicetur, quatenus nulla lex ex nostris ei contraria est. Idem etiam divus Augustus iudicavit.* – “In this fragment Eudaemon Nicomedia informed Emperor Augustus that having suffered a shipwreck in Icaria they have been plundered by the public service officials [tax collectors] who reside in the Cyclades. Emperor Antoninus answer to Eudaemon that he is the master of the world, but custom is the master of the sea. Thus, the issue should be judged according to the maritime law of the Rhodians in matters where no laws of our states to the contrary. The same has been confirmed by Augustus.”

A number of representatives of the doctrine, such as Dimitri C. Gofas (1995, 30), argue that around the middle of the second century AD there existed a body of rules called the *lex Rhodia*. They maintain that the name “Rhodian” came to be associated with a body of customary rules which had already existed for centuries, and which had been gradually developing around the Eastern Mediterranean seaboard at least since the period of Phoenician domination (Dauvillier, 1959, 53–56).

There is also evidence that during the fifth century BC, Demosthenes and other Athenian orators began to mention a body of rules they referred to as “commercial laws”; which by the middle of the fourth century BC seem to have gained Panhellenic character Gofas (1995, 30). In the third and second centuries BC, this body of maritime customs under the name of Rhodian law were internationally acknowledged (*ius gentium*) and became known to the Romans when, after the Carthaginian Wars and during the evolution of Roman commercial and maritime activities, they started visiting the island of Rhodos. The reason for those visits was probably the desire among Roman jurists to study at the famous Rhodian

² Lucius Volusius Maecianus was an important jurist of the classical period of Roman law. He held a number of public positions as the head of the office and *libellis*, *praefectus vehicularum*, *praefectus annonae* and *praefectus* of Egypt. Taught law to Marcus Aurelius, and enjoyed *ius publice respondendi ex auctoritate principis*. His main works include *Quaestiones de fideicommissis* (16 books) and, in the field of criminal law and procedure, *De iudiciis publicis* (14 books). Cf. Litewski (2000), 145.

school of rhetoric.³ As a result, during the pre-classical period of Roman law the Rhodian law came to be incorporated into the Roman legal system, and it is very probable that it was implied in all contracts for the carriage of goods by sea (Zimmermann, 1996, 408). The issue of reception of the rules from Rhodian law into Roman law has been a subject of scientific debate. Most probably, the transfer of the rules regulating goods cast overboard did not consist in an introduction of dedicated statutes into Roman legislation, but rather in the adoption of an appropriate legal principle which had been functioning earlier within *ius gentium* (Zalewski, 2016, 176; footnote 7 and literature cited there).

As for *de lege Rhodia de iactu* in Justinian's Digest, it has to be noted that apart from the main subject of this title, i.e. *iactus* (jettison and contribution), certain fragments do not actually pertain to *iactus*. One passage is concerned with the rights and obligations of the shipper under the agreement which he had concluded with a freighter, in relation to the carriage of freight; another fragment addresses questions connected with shipwreck and the potential claims of the fiscal agents (D. 14.2.10) (The Digest of Justinian, 1998, 421).

The origins of general average

Carriage of goods by sea is an enterprise joining many separate and diverse interests into a "common venture". Such are the responsibilities and the rights arising from the venture that all parties – carriers, owners, mortgagers, crew, charterers, shippers and consignees – share the risks, losses and benefits which may ensue (Sowiński, 1935, 205–206). It is probable that this maritime custom developed spontaneously and independently in different parts of the world at a time when distance precluded any contact between them or reciprocal influence. Its origins can hardly be precisely determined, but many historians believe that it had been in existence and widely applied in the wider maritime community for centuries (Bolanča, Amižić, Pezelj, 2017, 2). The first written trace of general average was *lex Rhodia de iactu*, which stipulated that if merchandise was thrown overboard in order to lighten a ship, that which was given for all should be replaced by the contribution of all.⁴ The only recognized form of general average sacrifice was the jettison of cargo (mostly in an endeavour to increase the buoyancy of the damaged ship and prevent her sinking). General average derived from ancient Greek law and was afterwards further developed in Roman and Byzantine law (*Nomos Rhodion Nautikos*, from the seventh – ninth century), in which general

³ Such conclusion can be drawn following an analysis of texts by classical jurists, who referred to the Rhodian law in their writings. For example, Cic. *Off.* 3.23 refers to a solution connected with jettison which he borrowed from Hecaton of Rhodes. What is more, one chapter of the postclassical collection of *Pauli Sententiae* is entitled *ad legem Rhodiam* (Paulus, *Sent.* 2.7).

⁴ D. 14.2.1: *Lege Rhodia cavetur, ut, si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*

average included losses caused by *casus fortuitus*, *vis maior*, attacks of pirates and collision of ships (Bolanča, Amižić, Pezelj, 2017, 2).

The contributions were based on the idea of a community of risk and stemmed from the principle of *aequitas*.⁵ This principle was closely connected with the idea of *periculum maris*, which means that the risk at sea is common to all those who take part in a maritime venture⁶, so that any damage or loss incurred for the common good must be met by common contributions (Gofas, 1995, 34).

***Lex Rhodia de iactu* and damage suffered in another person's interest in Polish civil law – purpose and function of the regulation**

Showing the origins and implementation of the principle of general average as well as earlier reception of the Rhodian law rules into Roman law was necessary in order to demonstrate analogies between Polish regulations concerning damage suffered in another person's interest and those set forth in the Rhodian law, which Roman law later embraced. Analysis of Art. 438 of the Polish Civil Code of 1964 (further as PCC) and other rules that apply to the issue in question, compared with the Roman regulations included mainly in Justinian's Digest will allow to show that the Rhodian law, is in fact a prototype of the Polish regulation contained in Art. 438 PCC.

Introduction to Book 14 of the Digest contains the most basic and concise definition – ascribed to Paulus – of the legal arrangement which is central to the entire *Lege Rhodie de iactu*:

D. 14.2.1. *Paulus libro secundo sententiarum: Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.* – “The *lex Rhodia* provides that if jettison of merchandise has been carried out in order to lighten the ship, everyone must contribute to compensate for what has been given up for the sake of all.”

This text is often compared to the corresponding passage in Paulus, *Sent.* 2.7.1:

Levandae navis gratia iactus cum mercium factus est omnium intributione sarciatur quod pro omnibus iactum est.

The above excerpts suggest that jettison calls for compensation on the part of those who did not suffer from it, provided that they have actually benefited from it. Aubert recognizes this institution as an early form of cargo insurance (Aubert, 2007).

⁵ D. 14.2.2 pr.: (...) *aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvo haberent.*

⁶ *Communis periculi* in Roman law was a binding element for all owners of goods imported aboard a vessel and the legal basis for the enforcement of mutual claims. Por. D. 14.2.3: *Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur.*

Here, one should also cite a fragment from Papinianus, found in Book XIX of the *Responsa*:

D. 14.2.3. *Papinianus libro nono decimo responsorum: Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur.* – “Where a mast, or any other part of the equipment of a ship is thrown overboard for the purpose of removing a danger common to all, contribution is required.”

As in the earlier D. 14.2.2.1, Papinianus specifies that *contributio* may derive from discarding the riggings of a ship (*arbor aut aliud navis instrumentum*), if it is done in the order to remove a common danger (*removendi communis periculi causa*).

Both above fragments are crucial given the main subject of this article. They show that there were two ways in which this institution was elaborated by the jurists in the Digest of Justinian. Apart from that, they evince generalization of risk-sharing rules that were anchored in the concept of common danger and rules of joint liability in maritime law.

To obtain a full picture of the similarity between the Polish and the Roman provision, one needs to quote the text of Art. 438 PCC: “Anyone who, in order to avert damage threatening another person or in order to avert a common danger, compulsorily or even voluntarily suffers financial damage may demand remedy of the losses suffered in the appropriate proportion from the persons who benefited therefrom.”⁷

First, one notices that common danger is the primary element which connects all cited fragments. Second, a possibility of redress is given to the unfortunate owner of lost goods, because his property was sacrificed in order to save the property of others. He incurred a loss for the common benefit so he may demand compensation from all persons who have benefited, at a ratio appropriate to the loss suffered.

On the one hand, through the regulation contained in Art. 438, the Polish legislator wanted to protect social trust, and on the other hand wished to protect the interests of the person who sacrifices their property to eliminate the damage or danger that threatens other people. The validity of Art. 438 with respect to equity is also emphasized in the rulings of the Polish Supreme Court,⁸ which examined that behavior within the framework of the situation expressed in Art. 438 of the PCC; it has been compared in the jurisprudence to a type of civic care and activity whose development should be fostered, including through legal protection.⁹

⁷ This provision refers in its wording to the previously applicable Art. 122 Polish Code of Obligations of 1933: “Anyone who, in order to reverse the threat of the second damage or common danger, voluntarily or even forcibly suffered material damage, may demand from those who benefited from it, pay in the appropriate proportion of the loss suffered.”

⁸ Judicial decision of the Polish Supreme Court of January 14th, 2015, II CSK 248/14, Bulletin of the Polish Supreme Court 2015, No. 3.

⁹ Judicial decision of the Polish Supreme Court of May 28th, 1997, III CKN 82/97, Case Law of the Polish Supreme Court. Civil Chamber 1997, No. 11, item 178.

The principle of *aequitas*, similarly as in the Roman law, is causing enforcing the regulation included in Art. 438 of the PCC. However, it isn't changing the fact that Art. 438 is being regarded by the Polish doctrine and the jurisprudence as self-contained base of the liability for loss, which is independent from the fault, the risk or the rightness principle's (Kasprzyk, 1989, 22).

The Rhodian and the Polish regulation – comparative analysis

For a more detailed picture of the resemblance between the Rhodian law and the Polish regulation one needs to analyze the crucial elements which enabled or enable them to apply. For this reason, discussions introduced in this section will include such issues as: character of threatening danger, aim of behaving of the aggrieved party, the bereavement of the aggrieved party and the benefit on the side obliged as well as compensation for loss.

Source of the threatening danger

According to the first requirement stipulated in the Rhodian law (Osuchowski, 1951, 47), danger must threaten the ship and the cargo directly. From the Roman legal perspective, it meant that danger cannot have been caused by any person interested in the ship or the cargo. If any owner of cargo jettisoned the cargo without a reason in the shape of danger, they bore responsibility for the *damnum iniuria datum* and could be sued under *lex Aquilia*, *actio in factum* or *actio doli*.

In Polish law, there was a question whether compensation is also granted when the same person was exposed to the threat of salvage. Generally, common danger should not be invoked by a person who claims damages but other views have been expressed in the doctrine as well:

- when an action brought by a person who claimed damages was unlawful, the compensation was not granted,
- only if the person who claimed damages was guilty of the action, even though the action was not unlawful, compensation was not granted,
- both cases were assessed in the light of Art. 5 PCC, which provides for the abuse of subjective rights (Machnikowski, Śmieja, 2018, 802–803).

Aim of behaving of the aggrieved party

Given the issue under consideration, another requisite which may be compared here is the action which must be taken in order to prevent general average. Before discussing the cause of the complaint, the complaint itself should be examined more closely. In the Roman legal regime, carriage by sea was usually undertaken by way of *locatio conductio operis contract* (Lenel, 1889, 1038: *Pauli ad edictum libri XXXIV*; cf. Płodzień, 2011, 73). This contract bound the *magister navis* to transport the customer's goods to the port of destination. Under the contract he was

not, of course, supposed to throw them overboard. If he did so, he was therefore liable to his customer under *actio locati*. If, however, it was inequitable to let the loss lie with the person whose goods had been sacrificed, it would have been equally inequitable to see the *magister navis* lose out. He was therefore able to proceed against the other customers whose goods had been saved. For this purpose, he could avail himself of the *actio conducti* or he could induce the other consignors to make their payment by withholding their goods (*ius retentionis*) (Zimmermann, 1996, 408). In the end, the loss was to be split equally between all participants of this communal enterprise, and the action was adjusted accordingly.¹⁰

This brief description demonstrates the rules which governed pursuit of complaint in the case of *iactus* in order to withhold general average (*communio*), which imposed the obligation of contribution. Now, one should also review the circumstances provided in Roman sources, which constitute a case of general average and thus a purpose to act. Justinian's Digest enumerates the following:

- severe and unexpected storm at the sea has befallen the ship, creating the danger of sinking,¹¹
- this unexpected circumstance made some extraordinary measures necessary in order to save the ship from sinking and the cargo from being lost, and it was not only jettison but also the severing of a mast or of the rigging of the ship, with the consent of the passengers¹² or transshipment of a part of the cargo into the ship's boats in order to lessen the burden on the ship,¹³
- goods jettisoned have been effectively lost,
- the jettison has effectively resulted in the ship being saved (Gofas, 1995, 34; Płodzień, 2011, 74).

Fulfilling mentioned above premises enabled the aggrieved party to lay a claim for the compensation for loss. Nevertheless the subject of such claim was different in the Roman law than in the Polish law. Previously cited D. 14.2.3 suggests that Romans took into consideration only material damage but in Polish law it is possible to investigate personal injury as well.¹⁴ According to Art. 438 PCC, action taken by the victim is intended not only to prevent the danger to others but also to the victim. The action must be taken to eliminate the threat of injury, or "with a view to obviating shared danger" as Art. 438 puts it. Absence of the purpose

¹⁰ See Zimmermann (1996), 408: "The first locator could sue the magister navis for the value of his property that had been jettisoned, minus his own share of the loss; the magister navis, in turn, would sue the other locatores for their pro rata contribution."

¹¹ D. 14.2.2 (*tempestate gravi orta*); D. 14.2.6 (*Navis adversa tempestate depressa*); D. 14.2.2 pr. (*Laborante nave*).

¹² D. 14.2.2.1 (*voluntate vectorum*); D. 14.2.3 (*Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur*).

¹³ D.14.2.2.4 pr.

¹⁴ The Polish legislator meant not only damage to property, but also non-material damage (threat of harm to someone) as well as damage in such goods, as the right to the image or the right to the name. See Kubas (1979), 93.

of action means that the compensation should not be awarded. Apart from the above, the Polish legislator defined other additional requirements that allow one to claim compensation for the loss sustained in someone else's interest as:

- occurrence of the danger of suffering harm by another person or common danger,
- voluntary or compulsory prejudice on the part of the person acting in someone's interest,
- benefit gained by the persons in whose interest this action has been taken,
- existence of a causal relationship between the victim's actions and the emergence of the aforesaid benefits (Machnikowski, Śmieja, 2018, 803).

The above warrants provide one common conclusion, namely that the action taken by the aggrieved party would have to have been adequate to the situation and involved prior deliberation. But this matter was perceived similarly in Roman and in Polish law. Sacrificial activity as a requirement for compensation seems indispensable, but one needs to consider that even confronted with minor danger people are often unable to make clear-headed assessments of facts. Still, it must be taken into consideration that concept of general average, which presupposed the obligation of contribution was adopted into both legal systems, first into Roman, and then from Roman into Polish law. Also, it needs to be stressed that in either framework the introduction of such a solution was dictated by equitable reasons.

The Roman sources do not provide information about a formal declaration of the need to jettison the cargo. For this reason, there is a divergence of views on this subject between commentators of Roman legal texts. Influenced by medieval maritime laws, earlier authors were convinced that persons traveling aboard a ship held counsel before casting any goods into the sea. As there is no clear evidence in the Roman sources about a dispute before the *iactus*, it is to be assumed that the decision was made by the *magister navis* (Płodzień, 2011, 77).

In the Polish regulation, incurring loss to protect others from harm or to prevent common average is always, if only partly, dictated by the intention of achieving such a result. Therefore, if the measures taken to remove the threat of injury were unreasonable (and even pointless), and had the desired effect only by a happy coincidence, compensation should not be awarded (Machnikowski, Śmieja, 2018, 804).

Bereavement of the aggrieved party

As for the next requirement, we must bear in mind that effective loss of the jettisoned goods and sacrifice of particular property had to exist while the aggrieved party have made the complaint for the compensation. It means that in Polish law, just as in Roman law, there is a principle that material damage must be compensated in full, and the value of the saved cargo must be included in the

calculation of the compensation; otherwise, unlawful enrichment would ensue (Sowiński, 1935, 206).

Roman sources clearly indicate that only the owner who has lost his goods,¹⁵ or the one whose goods were damaged¹⁶ during jettison may demand joint compensation for losses suffered as a result of the jettison with the complaint *actio locati* or *actio conducti* against the manager of the ship. Thus, if the lost goods have been recovered in some way, the owners of the jettisoned property lose the right to compensation and, if they have already received it, they must return it to the grantors. should the lost goods have been recovered (Płodzień, 2011, 82).

From the standpoint of Polish law, the action of the aggrieved party must involve their loss of property in order to counter the threat of damage, where the loss further entails His loss the benefit of those from whom compensation is claimed. What is more, a relation within the meaning of the *conditio sine qua non* theory must occur between loss and benefit (Machnikowski, Śmieja, 2018, 805).

Benefit of the obliged party

Finally, one needs to mention the successful outcome of sacrificing property. Again, the provision in Art. 438 PCC is very close to what Romans took from Greeks. The principle formulated at the outset states that an obligation to compensate for the damage which has occurred arises only when the ship is rescued (*salva nave*) with the rest of the cargo remaining on it. In the Roman source, i.e. D. 14.2.2 pr., the gloss of Accursius also conveys that the person whose goods have been sacrificed should be able to proceed directly (*via recta*) against the other persons deriving a benefit therefrom, for their pro rata contribution. Thus, one would be able to avoid the somewhat cumbersome detour via the conductor.¹⁷

In Polish law, a claim under Art. 438 PCC can only be directed against those who have benefited directly. This claim can be also made when the aggrieved party has sacrificed certain property, even exclusively, to save their own goods, as long as other people have also benefited from it. As already observed, causation has to exist between the loss and the benefit (Borysiak, 2019, 8).

Compensation for loss

The last element to be analyzed here is the redress of damage. It should be emphasized that this element can only be taken into consideration if the jettison has effectively resulted in the ship being saved (Gofas, 1995, 34). According to the Roman sources (D. 14.2.1) the damage incurred as a result of jettison has to be covered by all persons interested in the ship and the cargo (*omnium contribu-*

¹⁵ D.14.2.1 (*datum est*).

¹⁶ D. 14.2.4: (...) *nam sciut ei qui perdiderit subvenitur, ita et ei subveniri oportet, qui deteriores propier iactum res habere coeperit.*

¹⁷ Thus, the *Lex Rhodia* moved into close proximity of the *negotiorum gestio*. Zimmermann (1996), 410.

tione sarciatur quod pro omnibus datum est). Moreover, it may be concluded from D. 14.2.2.2 that owners of the saved cargo have to compensate for the damage proportionally to its value, not weight. We can also find source where Paulus also obliges the injured parties to jointly compensate for the damage.¹⁸ The last person who according to the sources has to participate in compensation is the ship owner (*dominus navis*). Their participation is proportional to the total value of the ship.¹⁹

In Polish civil law, the person whose property suffered loss can demand compensation from those who obtained benefit. When actions aimed at preventing the damage have benefited several people at the same time, the aggrieved party may demand compensation from each of them in a “commensurate relationship”, and therefore in a proportion in which the amounts of these benefits remain to each other (Borysiak, 2019, 11). Hence, there is no need to resort to joint and several liability, because the claimant has a separate claim against every beneficiary (Kubas, 1979, 91).

When examining the redress of damage resulting from common danger, we need to consider contribution of the group whose goods have been saved from common average in Roman law, and determine precisely what this damage means in Polish law. So all objects saved from common average are required to contribute according to the value they would fetch when sold (Gofas, 1995, 34). Goods saved but damaged were estimated with their damage and being taken into consideration with less the cost of the damage.²⁰ According to Paulus, whose view is expressed in D. 14.2.2.2, lost objects should be estimated according to the price of their purchase, without taking into account the possible profit from their sale.

Art. 438 PCC leaves no doubt that under this regulation only material damages can be compensated for. It means that a person who tries to eliminate danger cannot raise claims with respect to personal harm. It clearly follows from the article that while compensation for the loss incurred (*damnum emergens*) is claimed, it should be recognized that the claim does not cover one’s lost profits (*lucrum cessans*) (Antoszek, 2019, 6). The amount of compensation is predicated on the amount of the loss suffered by the claimant, and the extent of benefit asserted by the person(s) from whom the claim is being sought. Generally, the aggrieved party should obtain total compensation for the loss even if that loss was small in relation to the benefits as well as in the case of common average.

Here, it becomes evident yet again that the Polish regulation has his roots in the *lex Rhodia de iactu*, subsequently transplanted into Roman law where the rule

¹⁸ D.14.2.2.4: (...) *Portio autem pro aestimatione rerum quae salvae sunt et earum quae amissae sunt praestari solet.*

¹⁹ D.14.2.2.2.

²⁰ D.14.2.4.2.

of *omnium contribution sarciatur* was – as in Poland – applied in accordance with the principles of equity.²¹

Conclusions

The general aim of this article has been to show that the Rhodian law is a prototype of claim for damage suffered in another person's interests in Polish law. *Lex Rhodia de iactu* was adopted and successfully employed in Roman law. That is why I demonstrate how Polish regulations concerning the claim for damage suffered in another person's interests work by comparing principles of the Roman *iactus* and the application of Art. 438 PCC. The analysis has been carried out in the light of underlying rules and principles, to elucidate their functioning in Roman and Polish law. Consequently, one can see that the requirements posited in both institutions are very similar and the general structure has remained unchanged. The respective Roman as well as Polish regulations derived from the Rhodian law operate in the circumstances of common average. What is more, fairness (*aequitas*) was the chief reason why the *lex Rhodia* was integrated into Roman law, and the same can be said about Art. 438 in Polish civil law. Moreover, Art. 438 PCC is treated as a *sui generis* and unique regulation. Due to the fact that common average is characteristic for shipping, and is rarely encountered in the circumstances regulated by the Polish Civil Code, Art. 438 is hardly ever applied in practice. Also, the infrequent practical use of this institution may be attributed to the fact that the hypothesis of Art. 438 intersects with the hypotheses in e.g. Art. 757, Art. 142, Art. 423, Art. 424, causing possible convergence of claims. It occurs quite often in practice, but the choice of the type of claim lies ultimately with the aggrieved party. It should also be considered that pursuant to Art. 438 only losses can be claimed (*damnum emergens*) while lost profits remain unsettled, hence in case of overlapping standards it is expedient to use such a claim that allows full compensation. What is more, the existence of Art. 438 PCC does not preclude tort claims which can be brought by the aggrieved party against persons responsible for an event which led to a threat of harm or caused a common danger. The rights of the former under Art. 438 – if they have been impoverished due to the action of a third party – include the possibility of resorting to claims for unjust enrichment against persons who have benefited thereby, as determined by the Polish Supreme Court.

In summary, it has to be observed that Art. 438 PCC is a legislator's encouragement to the third parties to intervene for the good of others, which is construed as a desirable preventive behavior. From this reason, broad interpretation enables the regulation of Art. 438 to be considered as quasi-preventive. Preventive remedy measures are not a worthless sophistication in law; their existence is a real

²¹ Sentence of Polish Supreme Court from 14.01.2015, II CSK 248/14, Bulletin of Polish Supreme Court 2015, No. 3.

necessity in today's society. In the contemporary world, decisions taken by an individual (their rational choices) influence the lives of others in an unprecedented manner. Many human actions today can have far-reaching effects, affecting the life or health of many others, as well as the environment and our planet as a whole, and even future generations.

Secondary Sources

- Antoszek, T. (2019), Komentarz do art. 438 KC, [in:] M. Gutowski (ed.), *Komentarz do kodeksu cywilnego*, Warszawa, pp. 2–9.
- Aubert, J.J. (2007), Dealing with the Abyss: The Nature and Purpose of the Rhodian Sea-Law on Jettison (Lex Rhodia de iactu, D 14.2) and the Making of Justinian's Digest, [in:] J.W. Cairns, P. du Plessis (eds.), *Beyond Dogmatics: Law and Society in the Roman World*, Edinburgh, pp. 157–172.
- Bolanča, D., Amžić, P., Pezelj, V. (2017), General average – an ancient institution of maritime law, *Ius Romanum* 2, pp. 389–400.
- Borysiak, W. (2019), Komentarz do art. 438, [in:] K. Osajda (ed.), *Komentarz KC*, vol. 2, Warszawa, pp. 2–14.
- Daresté, R. (1905), Lex Rhodia de iactu, *RPh* 29, pp. 1–29.
- Dauvillier, J. (1959), Le droit maritime phénicien, *RIDA* 6, pp. 53–56.
- Gofas, D.C. (1995), The Lex Rhodia de iactu, [in:] M.H. Nordquist, J.N. Moore (eds.), *Entry Into Force of the Law of the Sea Convention*, Netherlands, pp. 29–43.
- Kasprzyk, R. (1989), Podstawa roszczenia przewencyjnego, *Palestra* 33.3, pp. 17–33.
- Korzonek, J., Rosenblüth, I. (1934), *Kodeks zobowiązań. Komentarz*, vol. 1, Kraków.
- Kubas, A. (1979), Wynagrodzenie szkody poniesionej w cudzym interesie, *Studia Cywilistyczne* 30, pp. 43–101.
- Lenel, O. (1889), *Palingenesia Iuris Civilis*, vol. 1, Lipsiae.
- Litewski, W. (2000), *Jurysprudencja rzymska*, Kraków.
- Machnikowski, P., Śmieja, A. (2018), Prawo zobowiązań – część ogólna, [in:] A. Olejniczak (ed.), *System prawa prywatnego*, vol. 6, Warszawa, pp. 799–808.
- Osuchowski, W. (1951), Ze studiów nad rzymskim prawem morskim. Uwagi nad zagadnieniem zrzutu morskiego w prawie rzymskim, *Czasopismo Prawno-Historyczne* 3, pp. 41–52.
- Płodzień, S. (2011), *Lex Rhodia de iactu. Studium historycznoprawne z zakresu rzymskiego prawa handlowomorskiego*, Lublin.
- Sowiński, W. (1935), *Prawo handlowe morskie w zarysie*, Warszawa.
- Sójka-Zielińska, K. (2010), *Drogi i bezdroża prawa. Szkice z dziejów kultury prawnej Europy*, Wrocław.
- Watson, A. (1993), *Legal transplants. An Approach to Comparative Law*, Athens–London.
- Zalewski, B. (2016), Creative interpretation of lex Rhodia de iactu in the legal doctrine of ius commune, *Krytyka Prawa* 8.2, pp. 173–191.
- Zimmermann, R. (1996), *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford.

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**RHODIAN LAW AS A PROTOTYPE OF THE CLAIM FOR DAMAGE
SUFFERED IN ANOTHER PERSON'S INTEREST IN POLISH CIVIL LAW**

The doctrine of Rhodian law of jettison has a long history in Roman law and has been inherited by numerous legal systems of today. During the pre-classical period of Roman law, Rhodian law was incorporated in the Roman legal system, and probably it was implied in all contracts of carrying goods by sea. Rhodian law was also a prototype of a claim for damage suffered in another person's interests in Polish civil law. The Author presents the origin of general average, the reasons of the introduction of this regulation, as well as its function in Roman law and Polish civil law. The article explores the premises of the regulation and provides its comparative analysis. Art. 438 of the Polish Civil Code of 1964 is rarely used in practice due to many competing actions that can be taken by suffered persons. From the point of view of the purpose of this regulation, the most important is to encourage third parties to intervene in the interests of others, which is desirable preventive behavior that can be recognized as a quasi- preventive remedy and is necessary in today's society.