Bronisław Sitek[1]

Damnum futurum (*damnum infectum*) – future damage. Comparative law study

1. Introduction

Damnum futurum is a phrase which occurs 16 times in the preserved sources of Roman law, mainly in the texts of the Roman jurists (*prudentes*) of the classical period[2] and once in the preserved fragment of the constitution of Diocletian coming from 290 or 293[3]. Using the lexical translation of this phrase, it can be understood as "'Threatened or apprehended injury' it means threatening damage. Likewise, this phrase is translated into Italian, German or Spanish. It can therefore hypothetically assume that *damnum futurum*, it is such a damage that has not happened yet, but it realistically threatens, or at least the circumstances indicate that it is highly probable that it will happen.

The basic legal and at the same time, semantic problem that should to be solve solve is the issue of the difference between the phrase "damnum futurum" a legal institution *damnum infectum*. The analysis of the Roman doctrine shows that fundamentally, this issue was ignored by the Romanists of old[4] and modern[5] times. Their attention was focused on discussing "damnum infectum" without referring to the phrase "damnum futurum".

---

[1] Prof. dr hab. prawa, Wydział Prawa Uniwersytetu Humanistycznospołecznego SWPS w Warszawie.

[2] Ulp. 24 ad. (D. 10.4.5.4); Paul. l. 6 ad Sab. (D. 17.2.38 pr.); Paul. 32 ad ed. (D. 17.2.67 pr.); Ulp. 32 ad ed. (D. 19.2.15.2); Ulp. l. 4 fideicommissum (D. 36.1.13 pr); G. 28 ad ed. provinc. (D. 39.2.2); Ulp. 53 ad ed. (D. 39.2.7.2); Paul. 48 ad ed. (D. 39.2.18.4); G. ad ed. *praetoris urbani titulo de damno infecto* (D. 39.2.19.1); G. 28 ad ed. provinc. (D. 39.2.32); Pomp. 21 ad Sab. (D. 39.2.39 pr.); Ulp. 43 ad ed. (D. 39.3.6.4); Paul. 49 ad ed. (D. 39.3.11.3); Paul. 49 ad ed. (D. 39.3.14.2); Paul. 49 ad ed. (D. 39.3.14.3); Ulp. 68 ad ed. (D. 43.15.1.3);

[3] Diocl./Maxim. C. 4.23.1. from 293 or 293. Uncertain date.

[4] See: Ch.A. Hesse, Über die Rechtsverhältnisse zwischen Grundstücks-Nachbarn, Band [1]: *Insbesondere über die cautio damni infecti und die aquae pluviae arcendae actio, nebst Beiträgen zur Negatorienklage und zum Wasserrechte*, Eisenberg 1859, p. 219.

[5] See: T. Giaro, *Nowa hipoteza na temat 'damni infecti lege agere'*, t. 64, 1976, s. 91–106; idem, *Il limite della responsabilità 'ex cautione damni infecti'*, BIDR 78 (1975), p. 271–283.

Therefore the question arises whether they were identical concepts, and thus whether it was a kind of tautology? The more that the phrase *damnum infectum* also means future damage. If so, for what purpose *prudentes* used the two terms to describe the same factual and legal status the same time? The problem of future damage also generates a number of other legal problems require particular comment, like the issue to consider it by the judge in the judgment, the valuation method, giving securities and their size. The object of this study is to clarify the conceptual distinction between *damnum infectum* and *damnum futurum* and to demonstrate the use of institutions of future damages in modern legal systems too.

2. *Damnum futurum* a *damnum infectum* in the sources of Roman law

The term *damnum infectum* is explained by A. Berger as the damage, which has not yet been formed which has come into being). This proposition finds its justification in the preserved text written by Gaius.

> G. 28 ad ed. provinc. (D. 39.2.2): *Damnum infectum est damnum nondum factum, quod futurum veremur*.

According to Gaius, *damnum infectum* is a damage, which has not happened – *nondum factum*. However, there is certainty about its formation in the unspecified future. This certainty stems from the fact of real danger coming from the neighboring land, for example – from the fact of existing or being built faulty construction (building or other construction)[6]. This defectiveness also determines the limit of the time of its creation. The end of unspecified time is usually determined by the natural processes of aging of materials, from which the threatening object of the neighboring land has been made, or by the forces of nature, for example – the flood, which is periodically repeated at a particular location.

According to D. Johnston[7], the term *damnum infectum* was used in urban areas, not necessary located in cities. The characteristic of this places was the formation of such a loss in connection with the construction of various construction works, but also other elements of the infrastructure, for example – ditches. Trebatius believed that even the construction of building which will eventually overshadow the portion of neighboring land may be recognized as

---

[6] S.v. *damnum infectum*, [in:] *Encyclopaedic Dictionary of Roman Law*, Philadelphia 1953, p. 424.

[7] D. Johnston, *Roman Law in context*, Cambridge 2007, p. 73.

the future damage[8]. The phrase *damnum futurum* was used in connection with the various institutions of Roman law. And so, they were used in connection with the creation of a damage on neighboring land as a result of the construction of equipment on the threatening grounds, which may affect the natural flow of rainwater[9]. This issue was extremely important due to the fact that most of Italy has the mountainous nature. Next, the term *damnum futurum* was used in the case of future damage which may occur as a result of taking off the ship, which floods settled on someone else's land[10]. Another usage of the term *damnum futurum* is connected with the necessity of taking the future damage into account by the judge, while resolving the dispute on the basis of *actio de socio*[11]. Other instances of the use of phrase *damnum futurum* occur when such institutions as *locatio conductio*[12], *s.c. Trebellianum*[13] and *manu-*

---

[8] Paul. 78 *ad ed*. (D. 39.2.25): *Trebatius ait etiam eum accipere damnum, cuius aedium luminibus officiatur*.

[9] Ulp. 43 ad ed. (D. 39.3.6. 4): *Si quis prius, quam aquae pluviae arcendae agat, dominium ad alium transtulerit fundi, desinit habere aquae pluviae arcendae actionem eaque ad eum transibit, cuius ager esse coepit: cum enim damnum futurum contineat, ad eum qui dominus erit incipiet actio pertinere, quamvis, cum alterius dominium esset, opus a vicino factum sit.*

[10] Ulp. 24 ad. (D. 10.4.5.4): *Sed et si ratis delata sit vi fluminis in agrum alterius, posse eum conveniri ad exhibendum Neratius scribit. Unde quaerit Neratius, utrum de futuro dumtaxat damno an et de praeterito domino agri cavendum sit, et ait etiam de praeterito caveri oportere.*

[11] Paul. l. 6 ad Sab. (D. 17.2.38 pr.): *Pro socio arbiter prospicere debet cautionibus in futuro damno vel lucro pendente ex ea societate. Quod Sabinus in omnibus bonae fidei iudiciis existimavit, sive generalia sunt (veluti pro socio, negotiorum gestorum, tutelae) sive specialia (veluti mandati, commodati, depositi).*

[12] Ulp. 32 ad ed. (D. 19.2.15.2): *Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, videamus. Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re oriantur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint. Sed et si labes facta sit omnemque fructum tulerit, damnum coloni non esse, ne supra damnum seminis amissi mercedes agri praestare cogatur. Sed et si uredo fructum oleae corruperit aut solis fervore non adsueto id acciderit, damnum domini futurum: si vero nihil extra consuetudinem acciderit, damnum coloni esse. Idemque dicendum, si exercitus praeteriens per lasciviam aliquid abstulit. Sed et si ager terrae motu ita corruerit, ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit.*

[13] Ulp. l. 4 fideicommissum (D. 36.1.13 pr): *Ille, a quo sub condicione fideicommissum relictum est, causari quid non poterit, ne condicio deficiat et haereat actionibus, cum nullum damnum sit futurum.*

missio[14] are discussed. In all these cases, a *damnum futurum* is a reference to future damage, which is also mentioned in the text of Gaius.

> Gai. *ad ed. praetoris urbani titulo de damno infecto* **(D. 39.2.19):** *Sive aedium vitio sive operis, quod vel in aedibus vel in loco urbano aut rustico, privato publicove fiat, damni aliquid futurum sit, curat praetor, ut timenti damnum caveatur.*

According to Gaius, the source of future damage could be the defectively constructed building – *aedium vitio* or improperly performed earthwork, for example – unprotected ditch or pit dug in the ground threatening the foundations of the building erected on the neighboring land. *Damnum futurum*, which is future damage had to be the result of human actions – *opus manufactum*. And the construction itself must be a threat to the neighboring land – *opus nociturum*[15].

The future damage could affect land and facilities located both in the city and in the countryside, on private or public land. That threat, and so, the state of waiting for the event to the potential, future harm required to protect the interests of the potential victim. For this purpose, according to Gaius, the praetor should create a suitable legal instruments allowing the effective protection of the interests of the ruler of the affected land. The praetor's edict *de damno infecto* was such an instrument[16].

The resolving the problem of meaning of the phrase *damnum futurum* and its relationship with *damnum infectum* should be found in the passage written by Paulus.

---

[14] (D. 40.1.4): *Nihil autem interest, a quo quis suis nummis ematur, a fisco vel civitate vel a privato, cuiusque sit sexus is qui emit. Sed et si minor sit viginti annis qui vendidit, interveniet constitutio. Nec comparantis quidem aetas spectatur: nam et si pupillus emat, aequum est eum fidem implere, cum sine damno eius hoc sit futurum. Idem et si servus est.*

[15] See: H. Donelli, *Commentarii de iure civili*, ed. VI, Norimbergae 1830, p. 15. Donelleusz distinguished two forms of damage: *Id damnum duplex est: praeteritum, et futurum*.

[16] See: O. Lenel, *Das Edictum Perpetuum*, Leipzig 1927, reprint Aalen 1985, p. 551––553. The instruments of legal protection developed in Roman law in relation to *damnum infectum* were also used in municipal law, as exemplified by the text *lex Rubria*. See: M.J. Rainer, *Zum damnum infectum in der lex Rubria caput 20 und den Digesten, Ulpian 39, 2, 4*, [in:] Fundamina: A Journal of Legal History: Essays in Honor of Eric H. Pool (2005), p. 256; M.W. Frederiksen, *The Republican municipal laws: errors and drafts*, "Journal of Roman Studies 55" 1965, p. 183–198; E.G. Hardy, *The Table of Veleia or the Lex Rubria*, "English Historical Review" 1916, p. 353–379.

> Paul. 49 ad ed. (D. 39.3.11.3): *Officium autem iudicis inter duos accepti quale futurum sit, dubitare se Iulianus ait, si forte unius fundus fuerit cui aqua noceat, si vero in quo opus factum sit, plurium et cum uno eorum agatur: utrum et eius damni nomine, quod post litem contestatam datum sit, et operis non restituti in solidum condemnatio fieri debeat, quemadmodum, cum servi communis nomine noxali iudicio cum uno agitur, condemnatio in solidum fiet, quoniam quod praestiterit, potest a socio recipere? An vero is cum quo agitur pro parte sua et damni dati et operis non restituti nomine damnandus sit, ut in actione damni infecti fiat, cum eius praedii, ex quo damnum metuatur, plures domini sint et cum uno eorum agatur? Licet opus, ex quo damnum futurum sit, individuum sit et ipsae aedes solumque earum non potest pro parte dumtaxat damnum dare, nihilo minus eum cum quo agitur pro sua parte condemnari. Magisque existimat id servandum in aquae pluviae arcendae actione, quod in actione damni infecti, quia utrubique non de praeterito, sed de futuro damno agitur.*

The in-depth analysis of the Paulus' text was conducted by A. Steiner[17]. The subject of this decision is a situation in which damage was caused on the ground belongs to a single owner. The source of the damage came from the neighboring land, belonging to several co-owners (*plurima*). This damage was created as a result of the work (*opus factum*) on the threatening ground and affecting neighboring land, by, for example, changing the natural course of rainwater. The issue demanding solution was to determine the rules of co-owners' liability for the damage.

Paulus in the quoted text referred to the doubts about the solution which had previously living lawyer – Julianus. According to him, the judge was able to settle the issue in twofold way (*officium ... iudicis*). In the first case, when the action for damages was brought against one of the joint owners, whether the judge was ordered to pay in accordance with *aestimatio*, it means with the estimated value of the damage, already set in *litis contestatio*? The judge, in this case, would not apply the joint liability *in solidum* nor according to the size of the share in the ownership – *pro sua parte*. Such a solution would be analogous to the already known during the pre-classical period the rules of noxical liability applied in the event of damage caused by a common slave to a third party. In this case, the accused co-owner of a slave was responsible for the damage to the full extent and then, he could make the recourse against other co-owners of a slave.

---

[17] See: A. Steiner, *Die römischen Solidarobligationen: eine Neubesichtigung unter aktionenrechtlichen Aspekten*, München 2009. Online text http://books.openedition.org/chbeck/1170, no. 113–115 [retrieved: 3.01.2016].

The second possible solution, using again an analogy, it is a reference to the rules applicable with the responsibility for *damni infecti*, the responsibility, implemented on the basis of a*ctio damni infecti*. Julianus believed that although the damage was caused by the actions of one of the joint owners, however, it would not be possible in isolation from the whole estate – *ipsea aedes solumque earum non potest pro parte dumtaxat damnum dare*. The more that the quoted case refers to the future damage, which is clearly shown in the wording *Licet opus, ex quo damnum futurum sit ...* which in this case means nothing more but future damage in relation to the work undertaken by the co-owner. In this way, by applying the phrase *damnum futurum*, a time sequence between two events was determined. First, it was the realization of work by one of the co-owners, and only then as a result of this action a threat of the future damage was created.

In the final statement of this passage, Paulus, using the analogy[18], made a comparison of two of the process instruments, namely *actio auqae pluviae arcendae*[19] with *actio damni infecti*[20]. In both cases, the common element was that they were related to the future damage which means the damage not yet occurred at the time of proceedings. There is only the risk of future damage – *damnum futurum* and these measures are intended to avoid the implementation of that damage or to determine the amount of compensation, for example by determining the amount of collateral – *cautio*.

According to this, it can be said that the phrase *damnum futurum*, used by the Roman lawyers, was appropriate for the determination of the future damage. This phrase itself was not any legal institution. In the case of the term *damnum infectum*, it was not only the semantic definition, but also it was a legal institution, thanks to which the threatened by future damage person could, using *actio damnni infecti* or later *cautio damni infecti*, take legal action to neutralize the possibility of future damage[21].

---

[18] See: R. Reggi, *L'interpretazione analogica in Salvio Giuliano* (II), Studi Parmensi 3 (1953), p. 467–502.

[19] More about *actio aquae pluviae arcendae* see: F. Salerno, *"Aqua pluvia" ed "opus manu factum"*, [in:] Labeo 27 (1981) pp. 218; F. Sitzia, *Ricerche in tema di"actio aquae pluviae arcendae". Dalle XII Tavole all'epoca classica*, Milano 1977; A. Burdese, sv. *"Actio aquae pluviae arcendae"*, [in:] NNDI. I1, Torino 1957, pp. 257; M. Sargenti, *L'"actio aquae pluviae arcendae". Contributo alla dottrina della responsabilità per danno nel diritto romano*, Milano 1940.

[20] *Actio damni infecti* was brought as one of *legis actio*, also after the abolition of the formulary process, G. In the classical period, it was replaced by *cautio damni infecti*. See: M. Marrone, *Istituzioni di diritto Romano*, Palermo 1989, p. 410 and following.

[21] According G. Branca, the Paulus' text was interpolated, because in the legislative

3. Dogmatic elements of the future damage according to the Roman law

In principle, in the Roman law, the legal protection was gained by sufferer when the damage has already been formed. *Prudentes* dealt with liability rules of contract and tort, as well as with the valuation of damage (*aestimatio*) and with the size of the compensation[22]. But in the Roman law, the concept of future or threatening damage – *damnum infectum* was also developed. The phrase *damnum futurum* was a synonym of the term *damnum infectum*. The future damage was associated with the damage threatening the neighborly relations.

The threatening damage gave the basis for action by the owner of the property potentially at risk, in order to prevent the implementation of future damage. Hence, the potentially threatened could solicit at praetor to grant him the adequate pre-process protection in the form of praetor's *cautio* promised under *stipulatio damni infecti*[23] or *missus in possessionem* used to compel the owner of the threatening land to make *cautio* or as a form of *jus retentionis* aimed to satisfy the claims of the victim in case of fulfillment of the threat[24].

The value of the collateral could not exceed the value of the land or building at risk on the neighboring ground. The compensation could not therefore be the source of unjust enrichment to the victim.

The establishment of appropriate security (*cautio*) could be claimed by the owner of the land at risk, but also the one who had the right to dispose of the property – *jus in re*. Ulpian expresses some doubt as to the rights of the lessee or tenant of applying for the establishment of adequate security in the event of threatening harm[25]. This doubt was dispelled by Paulus in the below quoted f passage.

---

process, the possibility of suing for damages future was not envisaged. See: G. Branca, *La responsabilità' per danni nei rapporti di vicinanza e il pensiero dei veteres*, [in:] Studi Albertarii, vol. 1, Milano 1953, p. 356; A. Mozzillo, *Contributi allo studio delle „stipulationes praetoriae"*, Napoli 1960, p. 54 and following.

22 See: S. Wróblewski, *Zarys wykładu prawa rzymskiego*, Kraków 1916, p. 446–449.

23 G. 4.31.

24 See: M. Talamanca, *Istituzioni di diritto Romano*, Milano 1990, p. 451.

25 There are however texts in the sources containing some doubt as to the rights of the lessee or tenant of applying for the establishment of adequate security in case of threatening damage. Ulp. 53 ad ed. (D. 39.2.11).

> Paul. 48 ad ed. (D. 39.2.18 pr.): *Damni infecti stipulatio competit non tantum ei, cuius in bonis res est, sed etiam cuius periculo res est.*

According to Paulus, not only the bonitary owner, but also one who was in danger could come with a request to establish *stipulatio damni infecti*. It probably stated here about the lessee or the tenant, whose property goods, especially real estate, was threatened by the future damage, coming from the neighboring land. You can even go further and say that this power also belonged to the one who had land or personal easements.

The land owner or co-owner, not the one who made the changes on the neighboring ground, being the direct cause of the threat was always recognized as the passively legitimated – the defendant on account of the future damage.

An oath (*stipulatio*) requiring the payment of a particular sum of compensation, if this damage was occurred, was the source of liability for damage future. Thus, the traditional responsibilities built upon *lex Aquilia* could not be applied.

> Ulp. 53 ad ed. (D. 39.2.7.1): *Hoc edictum prospicit danno nondum facto, cum ceterae actiones ad damna, quae contigerunt, sarcienda pertineant, ut in legis Aquiliae actione at aliis. De damno uero facto nihibil edicto cauetur: cum enim animalia, quae noxam commiserunt, non ultra nos solent onerare, quam ut noxae ea dedamus, multo magis ea, quae anima carent, ultra nos solent onerare, praesertim cum res quidem animales, quae damnum dederint, ipsae extent, aedes autem, si ruina sua damnum dederunt, desierint extare.*

According to Ulpian, the responsibility of the owner of the land, from which the harm might have been caused, could be enforced only when the future event already happened. The responsibility shaped on the basis of the *lex Aquilia* concerned the damage already existing, it means the harm that the extent of which was already known. The principles of this responsibility were related with the damage resulting from the tort[26]. In the case of *damnum infectum*, the stipulation was the basis of liability. The establishment of security gave the right to come with *actio de damno infecti*. Furthermore, one cannot talk about *damnum infectum* if the damage is the result of majeure force – vis maior[27].

---

[26] See: F.M. de Robertis, *Damnum iniuria datum. Trattazione sulla responsabilità extracontrattuale nel diritto romano particolare riguardo alla lex Aquilia de damno*, Bari 2000, p. 41 and following.

[27] More about the reasons for exempting from liability on account of *damnum infectum* see: M. Sobczyk, *Siła wyższa w prawie rzymskim*, Toruń 2005, p. 82–90.

4. The future damage in the selected European legislations

In the Polish legal system, the future damage (*damnum infectum*) was clearly regulated in the article 151 § 2 of the Regulation of the President of the Republic of Poland of 27th October 1933 – Code of Obligations (Dz.U /Journal of Laws/ of 1933, no. 33): *The person whose it at risk of damage in the case of collapse of a building or other device may require the holder, to undertake the remedial measures which require reversal of the danger and in the case of failure, he can be authorized by the court to apply the measures at the expense of the holder*. The future damage in that provision was limited to the threatening damage which source of which could be a building or other device impending collapse. A threatening person could claim to take appropriate steps to reverse that threat[28]. This solution was undoubtedly rooted in the Roman Law, not only in the discussed earlier institutions of future damages (*damnum infectum*), but also in *effusum vel deiectum*, when a person, who does not suffer any damage, but felt threatened by the fact for example of pouring liquid impurity through the window, could apply for the imposition of appropriate penalties by the praetor on the holder of the apartment, from which pouring or expulsion occurred. The aim of this penalty was to refrain from performing acts that threaten the safety of pedestrians[29].

The prewar solution is not found in the postwar Civil Code of 1964. The issue of damage caused by the collapse or detachment of part of a building was regulated by the article 434, but not as the future damage, but as damage actually existed. On the basis of this article, the victim may seek compensation after the actual materialization of the events causing the damage and only up to the value of diminution of assets (*damnum emergens*).

The reflections about the future damage can be built only on the basis of the article 361 § 2 of the Act of 23rd April 1964 (hereinafter as the Civil Code)[30], which says as follows: *In the above limits, in the absence of a different provision of the Act or the provisions of the agreement, this compensation includes losses that the victim suffered and the benefits that could be achieved, if the damage not occurred*. This text *expressis verbis* refers to compensation for the

[28] See: A. Ohanowicz, *Zbieg norm w polskim prawie cywilnym*, Warszawa 1963, currently: A. Ochanowicz, *Wybór prac*, A. Gulczyński (elaboration) Warszawa 2007, p. 290.

[29] See: B. Sitek, *Actiones populares w prawie rzymskim na przełomie republiki i pryncypatu*, Szczecin 1999, s. 165 and following.

[30] Consolidated text Dz.U. (Journal of Laws) of 2014, item 121.

lost profits so it is about *lucrum cessnas*. In this way, this text was interpreted in the earlier legal literature[31]. T. Wisniewski, in this record, saw the so-called the possible damage, or the lost opportunities, for example – to conclude a lucrative contract. Such damage, according to the lawyer, may not, however, be subject to a claim for damages[32]. Similarly, it was said by W. Warkałło that distinguished three types of damage: *emergens damnum*, *lucrum cessans* and *lucrum speratum*, which is the expected profit[33].

M. Kalinski, the author of the basic studies on the legal problems associated with the institution of damages in civil law, following the views of the doctrine, does not deny the existence of the concept of future damage. Rightly, however, he poses a question about the subject of this study, namely, whether, in the light of the current law regulation, the future damage is subject of indemnity?[34] However, there are differences in doctrine as to the meaning of the term of future According to M. Kalinski, the future damage does not diminish the value of the subject, which can happen only in the future, and thus its size at the moment is difficult to determine. Its very existence as well as its size are still evolving. Such a concept of the future damage is therefore not acceptable.

Next, M. Kalinski says that we should rather talk about the future damage as about the damage which may happen after the court's decision, but this damage is in some way further specified whether by legislation or contractual regulation or by the sequence of events certain and predictable. In this case, however, it is necessary to come with the separate claim for damages. Also, the judicature does not rule on the future harm but on the damage already existing at the time of adjudication. However, two possible cases when the decision on future damages could be pointed out. The first one is a pension in the event of personal injury (article 444 § 2 of the Civil Code), which may also include future events. The second case is a claim of the mother of an illegitimate child to the father of the child (when a man has made recognition of paternity in the

---

[31] See: Z. Radwański: W. Czachórski (chief editor), *System prawa cywilnego*, vol. III, cz. 1: *Prawo zobowiązań – część ogólna*, Wrocław 1981, p. 227; M. Sośniak, *Prawo cywilne i rodzinne w zarysie*, vol. II: *Zobowiązania*, Katowice 1986, p. 79 and following.

[32] T. Wiśniewski, G. Bieniek and others, *Komentarz do kodeksu cywilnego*, Księga trzecia: *Zobowiązania*, vol. 1, Warszawa 1996, p. 123.

[33] See: W. Warkałło, *Odpowiedzialność odszkodowawcza: funkcje, rodzaje, granice*, Warszawa 1972, p. 137.

[34] See: M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2014, Chapter III, Legalis.

prenatal period – article 75 § 1 of the Law of 25 February 1964[35] – hereinafter as the Family and Guardianship Code) to cover expenses related to pregnancy and childbirth (article 141 § 1 of the Family and Guardianship Code)[36]. In both cases, however, we should rather talk about the future compensation costs (*damnum futurum*) than about the damage.

In the German law, the future damage which may be caused by the building threatening to the neighboring land was regulated in the same way as in the current Civil Code in Poland. An institution similar to the Roman *damnum infectum* can be however, found in § 907 point 1 of the BGB where it can be read: *Der Eigentümer eines Grundstücks kann verlangen, dass auf den Nachbargrundstücken nicht Anlagen hergestellt oder gehalten werden, von denen mit Sicherheit vorauszusehen ist, dass ihr Bestand oder ihre Benutzung eine unzulässige Einwirkung auf sein Grundstück zur Folge hat. Genügt eine Anlage den landesgesetzlichen Vorschriften, die einen bestimmten Abstand von der Grenze oder sonstige Schutzmaßregeln vorschreiben, so kann die Beseitigung der Anlage erst verlangt werden, wenn die unzulässige Einwirkung tatsächlich hervortritt.*

On the basis of this provision, the landowner may request that on the neighboring property, there is not made nor maintained the equipment, the existence of which could result an unacceptable impact on the ground. Applied by the legislature term *eine unzulässige Einwirkung* is not identical with the notion of the future damage. The German legislature the hazardous situation and possible future damage (*damnum futurum*) resolved through the prism of the legality of the investment carried out on the adjacent neighboring[37]. Such interpretation is the results of the two arguments. The first of these is in the last sentence of quoted provision of law, where it is clearly mentioned that the owner of the neighboring land cannot claim if the investment is erected or already exists under the regulation of laws (*landesgesetzlichen Vorschriften*) including the fact that the sufficient distance from the border has been preserved (*bestimmten Abstand von der Grenze*), or the other appropriate protective measures have been preserved (*sonstige Schutzmaßregeln vorschreiben*). The second reason, for which in the provision of § 907, point 1 of the BGB we cannot see the structure of future damage, is the realization of a claim of the

[35] Consolidated text Dz.U. (Journal of Laws) of 2012, item 788.

[36] See: T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 298.

[37] See: Ch. Salmen-Everinghoff, *Zur cautio damni infecti: die Rückkehr eines römisch-rechtlichen Rechtsinstituts in das moderne Zivilrecht*, Frankfurt am Main 2009, p. 127 and following

owner threatening land. The owner may come against the owner of the neighboring land in this case only with *actio negatoria*, in relation with § 1004 of the BGB. The German legislature therefore treats future damage as the threat to the smooth and calm holding of immovable property by the owner or person entitled to possession, for example – a tenant[38].

Discussing the concept of future damage (*damnum infectum* or otherwise *damnum futurum*), it is also necessary to describe them using the method of economic analysis of law, – a research method widely known and used in the culture of common law[39]. In the publications on the economic analysis of law, the future damage belongs to the *Tort Law* and it means that from the dogmatic and systematic side, the future damage is completely different located[40]. The content of neighborly relations is formed usually at the junction of two bordering properties. These relations are necessary and do not arise from the agreement or from the law, but they are the result of random events, especially the choices related to land purchase, lease, its use or disposal. Hence, the responsibility of the parties is based more on the principle of the risk, not on the principle of guilty. For that reason, both sides of neighborly relations are obliged to take special precautions (*joint precaution*), consisting in taking appropriate legal and economic measures of prudence and efficiency[41].

The victim, or potential victim by the damage threatening from the neighboring property selects the appropriate level of caution, bearing in this respect certain costs x. There is also the cost of the damage – A. The total cost of a possible victim is the sum of two components, it means: x + A = the amount of damage.

By assumption, the victim is required to minimize costs. The perpetrator of the damage must therefore pay the amount which results from the equation x+A, taking into account the principle of minimizing the cost by the victim. From the point of view of the economic analysis of law, the compensation is payable only after the occurrence of the damage, so the compensation for the

---

38 See: C. Bensching, *Nachbarrechtliche Ausgleichsansprüche-zulässige Rechtsfortbildung oder Rechtsprechung contra legem?*, Tübingen 2002, p. 97–99; D. Medicus, *Bürgerliches Recht*, Koln1999, p. 536–537.

39 See: J. Stelmach, B. Brożek, *Metody prawnicze*, Warszawa 2006, p. 126–160.

40 See: J. Arlen (ed.), *Research handbook on the economics of Torts*, ed. L. Arlen, Northamston, 2013, p. 614.

41 About making prudential rules, it is written also by: J. Szczerbowski, *Szkoda czysto majątkowa w kontekście unifikacji prawa prywatnego w Europie*, Olsztyn 2013, p. 29.

future damage is not applied. Therefore, the past activities related to the victim's request to remove structures that threaten the security of neighboring land are included to the total costs but they are calculated and paid after its occurrence[42].

5. Conclusions

In the texts of Roman law, the term *damnum infectum* is used to described and define the future damage. Next to it, the phrase *damnum futurum* is also applied. From the lexical and semantic point of view, these two expressions are identical. However, in the Roman literature, ancient and modern, there is not wider development, which would grant a definitive answer on the cause of the use of two terms as to describe the future damage. The analysis of sources in this study showed that the two terms are synonymous. *Damnum infectum* is a concept, and in fact the institution of law related to the future damage. This institution allowed to mobilize the process (*actio damni infecti or cautio damni infecti*) and out-of-court instruments of legal protection (*stipulatio damni infecti* or *missus in possession*) in the case of threatening damage which is alternately described as *damnum futurum* or *damnum infectum*.

The future damage was introduced to the article 151 § 2 of the Polish Code of Obligations of 1933 on the occasion of regulating the damage threatening from the defective building erected on the neighboring land. The civil doctrine did not deny the existence, in the legal dogma, of the concept of future damage, threatening or possible. Even in the Civil Code of 1964, there has been introduced provision of article 361 § 2, which would allow to develop the concept of future harm, but the judicature explicitly recognizes the existence of only damage already created.

In § 907, point 1 of the BGB, there is dogmatic construction of *damnum infectum*, but the threat from the neighboring land is treated as a violation of the peaceful ownership or possession of land at risk. Hence, they adopted such structure according to which the owner of the land being at risk for future damages may come with *actio negatoria* and may demand the cessation of all actions that threaten neighboring land, including the suspension of construction or removing them, as long as they are illegally erected.

[42] See: R. Cooter, Th. Ulen, *Ekonomiczna analiza prawa,* Warszawa 2009, pp. 410–412.

The solution of the liability and compensation for future damage were assumed in economic analysis of law. The future damage was included in the *Tort Law*. Both sides of the neighborly relations are obliged to take particular care and the efficiency of its operation (the principle of rational choice). But no one can claim any compensation for the future damage until this damage did not occur. However, its value includes the sum of two components, it means – the costs incurred for the implementation of this precautionary principle and the actual pecuniary damage.

Discussion of legal solutions concerning the future damage, used in the three jurisdictions (legal systems) and in one doctrine of Anglo-Saxon legal system, shows the variety of possible solutions applicable in this case, especially the indemnity of future damage or to derogate from the claims. Particularly, noteworthy, however, is the solution proposed in the doctrine of economic analysis of law, where the real damage is increased by the value of the application of prudential measures taken and used by the victim. Perhaps, this solution could be taken into account on the occasion of the next revision of the Civil Code.

Streszczenie

W tekstach prawa rzymskiego na oznaczenie szkody przyszłej stosowane są dwa bliskoznaczne pojęcia *damnum infectum* i *damnum futurum*. W literaturze romanistycznej dawnej i współczesnej nie znajduje się szersze opracowanie, które udzieliłoby ostatecznej odpowiedzi na przyczynę stosowania dwóch określeń co do szkody przyszłej. Analiza źródeł w przedmiotowym opracowaniu pokazała, że oba pojęcia są bliskoznaczne. Szkoda przyszła została wprowadzona do art. 151 § 2 polskiego kodeksu zobowiązań z 1933 przy okazji uregulowania szkody zagrażającej z wadliwego budynku posadowionego na sąsiednim gruncie. W kodeksie cywilnym z 1964 r. został wprowadzony przepis art. 361 § 2, który pozwalałby rozwinąć konstrukcję szkody przyszłej, jednak judykatura jednoznacznie uznaje istnienie jedynie szkody już powstałej. W § 907 ust. 1 BGB istnieje konstrukcja dogmatyczna *damnum infectum*, jednak zagrożenie pochodzące z gruntu sąsiedniego jest traktowane jako naruszenie spokojnego posiadania. Stąd przyjęto konstrukcję taką, że właściciel gruntu zagrożonego może w przypadku szkody przyszłej wystąpić z *actio negatoria*. W doktrynie ekonomicznej analizy prawa szkoda przyszła została zaliczona do prawa deliktowego (*Tort Law*). Obie strony stosunków sąsiedzkich zobowiązane są

do zachowania szczególnej ostrożności i efektywności swojego działania (zasada racjonalnego wyboru).

Keywords: *damnum infectum, damnum futurum*, the Civil Code, the Code of Obligations, the damage anticipated but not yet sustained (future damage), the BGB

Słowa kluczowe: *damnum infectum, damnum futurum*, kodeks cywilny, kodeks zobowiązań, szkoda przyszła, BGB