dirittifondamentali.it

La CEDU sulla mancanza di indagini efficaci e complete in un caso di negligenza medica (CEDU, sez. I, sent. 16 febbraio 2023, ric. n. 57916/16)

La Corte Edu si pronuncia sul caso di un cittadino polacco, il quale ha lamentato la violazione dell'articolo 2 della Convenzione per l'inadeguatezza delle cure di primo soccorso ricevute dopo un grave incidente automobilistico che lo ha lasciato tetraplegico, e per la mancanza di un'indagine efficace ed approfondita per presunta negligenza medica.
La Corte, chiamata a verificare se lo Stato convenuto avesse efficacemente protetto la vita del ricorrente, ha ritenuto che il soccorso medico e le prime cure prestate - per quanto carenti - non avessero messo in pericolo la vita dello stesso. Alla luce di siffatte considerazioni, i Giudici di Strasburgo hanno ricordato che gli obblighi positivi sostanziali dello Stato si limitano alla predisposizione di un quadro normativo adeguato che imponga ai servizi di emergenza e agli ospedali, siano essi privati o pubblici, di adottare misure appropriate alla protezione della vita dei pazienti. Sotto tale profilo il quadro normativo di riferimento è apparso pertinente e completo e, di conseguenza, non vi è stata violazione dell'articolo 2 della Convenzione nel suo aspetto sostanziale.
Diversamente, la Corte ha ravvisato la violazione dell'articolo 2 nel suo aspetto procedurale in quanto i meccanismi dell'ordinamento giuridico interno, considerati nel loro complesso, non hanno assicurato una risposta efficace e tempestiva da parte delle autorità coerente con gli obblighi dello Stato derivanti dalla suddetta norma convenzionale.

***

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF XXXXX v. POLAND
(Application no. 57916/16)

JUDGMENT
STRASBOURG
16 February 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXXXX v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,
Péter Paczolay,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Ivana Jelić,
Gilberto Felici,
Raffaele Sabato, *judges*,
and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 57916/16) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr. XXXXX ("the applicant"), on 29 September 2016;

the decision to give notice to the Polish Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 24 January 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns allegations of a breach of Article 2 of the Convention in connection with the inadequate first aid provided to the applicant in the immediate aftermath of a serious car accident that left him tetraplegic, and the lack of an effective and prompt investigation of these events.

THE FACTS

2. The applicant was born in 1986 and lives in Warsaw. He was represented by his father, Mr A. Nowak, a lawyer practising in Warsaw.

3. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE APPLICANT'S ACCIDENT

5. At around 11.30 p.m. on 2 January 2006 the applicant was involved in a road accident in Warsaw. He lost control of his car, which overturned and hit an electricity pylon. The pylon broke in half and fell onto the wreckage of the car, leaving an electrical cable dangling overhead.

6. The emergency services were informed by a witness and the first ambulance arrived within five minutes. The electricity company was notified of the need to cut the power. Ten minutes later the police and firefighters arrived.

7. The police, firefighters and the doctor at the scene, A.M., waited for an electrical engineer to arrive. They did not approach the car because of the risk of electrocution. During this period of about thirty-five minutes, no medical attention was given to the applicant, who was unconscious and trapped in the car.

8. An ambulance carrying resuscitation equipment arrived. The engineer also arrived, and the electricity supply was cut off at 12.07 a.m.

9. A.M. examined the applicant through a smashed car window. His findings were that the applicant had no pulse, was not breathing and that his pupils were not reacting to light. He informed the police and firefighters that the applicant was dead. A.M. approached the applicant twice more and repeated the same examination through the smashed window.

10. The ambulance subsequently left and a prosecutor was informed that an accident had taken place in which a person had died. A.M. stayed with the police officers and firefighters, who were preparing the equipment and light needed to cut open the car to extract the body.

11. While they were waiting for the prosecutor, a police officer who had recently arrived looked inside the car with a torch in order to retrieve the applicant's identity documents. At 12.30 a.m. on 3 January 2006 he noticed that the applicant was moving his lips and eyes slightly. He immediately ordered the firefighters to remove him from the car. A.M. approached the police officers and stated: "He is dead, I have examined him." The ambulance was called back to the scene.

12. The applicant was removed from the car at 12.50 a.m. and given medical attention. He was unconscious, breathing and had minor injuries. The prosecutor, who arrived at around that time, ordered that A.M. be tested to check whether he was under the influence of alcohol; the result was negative.

13. The applicant was transported to a hospital in Warsaw. He was in a coma for at least a month after the accident, and was then diagnosed with severe brain damage.

14. According to a disability certificate dated 8 April 2015 (valid for four years), the applicant's disability was significant, in that he needed permanent care and had a very limited ability to live independently.

II. DISCIPLINARY PROCEEDINGS

15. Following the findings made in an opinion issued by an internal team of doctors on 9 January 2006 (see paragraph 47 below), A.M.'s employment with the Warsaw Regional Emergency Service was terminated by mutual agreement.

16. On 7 April 2006 the Warsaw Regional Agent for Professional Liability (*Okręgowy Rzecznik Odpowiedzialności Zawodowej*) discontinued an investigation into A.M.'s conduct. The Agent relied

on conclusions made by A.Z., the Regional Consultant in Emergency Medicine (see paragraph 48 below).

17. On 14 March 2007, following an appeal lodged by the applicant, the Warsaw Chief Agent for Professional Liability (*Naczelny Rzecznik Odpowiedzialności Zawodowej*) quashed the challenged decision and remitted the case.

18. On 30 May 2007 the Warsaw Regional Agent for Professional Liability again discontinued the preliminary proceedings, agreeing once again with the conclusions of the Regional Consultant in Emergency Medicine and reiterating that at the material time there had been no standard medical procedure in place for such cases.

19. The applicant, who was represented by his father, appealed against that decision. On 7 November 2007 the Warsaw Chief Agent for Professional Liability dismissed his appeal and the decision became final.

III. CRIMINAL PROCEEDINGS AGAINST THE DOCTOR

20. On 20 January 2006 the Warsaw Praga-Południe District Prosecutor (*Prokurator Rejonowy*) discontinued the investigation into the accident, finding that the applicant had lost control of the car because he had been driving too fast for the weather and road conditions.

21. On 16 January 2006 the Warsaw Praga-Południe District Prosecutor opened an investigation into the manner in which aid had been provided to the applicant at the scene of the accident. On 29 March 2006 the prosecutor discontinued the proceedings, finding that no offence had been committed. He relied on the expert opinion of A.Z. that had been prepared during the disciplinary proceedings (see paragraph 48 below). The applicant appealed.

22. On 25 May 2006 the Warsaw Praga-Południe Regional Prosecutor quashed the decision and ordered the District Prosecutor to investigate further.

23. In the course of the investigation, the prosecutor ordered an expert medical opinion (see paragraph 49 below). On 28 September 2006 the Warsaw Praga-Południe District Prosecutor again discontinued the investigation.

24. The decision of 28 September 2006 was quashed by the regional prosecutor on 1 December 2006 upon the applicant's appeal. The regional prosecutor noted that the expert opinion had been incomplete and contained conclusions that contradicted themselves and statements contrary to the evidence collected.

25. On 15 March 2007 the district prosecutor for the third time discontinued the proceedings, relying in particular on the conclusions of the expert J.K. (see paragraph 50 below). The decision was again quashed on 14 May 2007.

26. On 26 June and 12 December 2007 the prosecutor stayed the proceedings. Following the applicant's appeals, both decisions to stay the proceedings were quashed on 13 September 2007 and 12 February 2008, respectively, by the Warsaw Praga-Południe District Court (*Sąd Rejonowy*).

27. On 12 April 2008 the applicant lodged a criminal complaint with the Warsaw Praga-Południe District Prosecutor's office (*Prokuratura Rejonowa*) against A.M. (the doctor) and W.K. (the firefighter

who had been in charge of the rescue operation). His complaint was joined to the pending investigation.

28. On 4 September 2009 the prosecutor discontinued the proceedings on the grounds that A.M. had fulfilled his duty to provide the applicant with the necessary first aid. The prosecutor relied in particular on a newly obtained medical expert opinion (see paragraph 51 below). The applicant appealed and the decision was upheld by the prosecutor of appeal. The applicant lodged a further appeal.

29. On 29 October 2009 the Warsaw Praga-Południe District Court quashed the decision and remitted the investigation to the Warsaw Praga-Południe Regional Prosecutor. It noted that the prosecutor had collected extensive evidence, but that the expert evidence did not fulfil the requirements to be considered sufficient and adequate evidential material. None of the three experts had issued a medical opinion that was complete, clear, and without contradictions. The assessments and assumptions made by the experts had either contradicted other evidence or been based on incomplete evidence. In particular, as regards the most important question of the adequacy of the medical examination carried out by A.M., the opinions had been laconic and had not explained the logic of the experts and the soundness of the final conclusions, all of which had been favourable to the doctor. The court noted that there had been several challenges to the expert opinion of A.Z., which had been based on incomplete evidence, and there had been doubts as to the impartiality of this expert who had participated in the proceedings before. The expert opinion of J.K. had been based on the incorrect assumption that the decision to remove the patient from the wreckage must have been made by a firefighter and not the doctor; moreover, the opinion had been silent on the fact that A.M. had not ordered the firefighter to remove the patient from the wreckage in order to be able to carry out a proper examination. The final expert opinion could not serve as a basis for the final resolution of the case either, as the expert, J.J., had assumed, contrary to the evidence collected, that A.M. had ordered the removal of the applicant from the car, but the execution of the order had been delayed because of the risk of electrocution and the need to wait for the prosecutor. To sum up, the District Court concluded that the experts on the basis of whose opinions the prosecutor had discontinued the proceedings had been either lacking impartiality or had given their opinion after a superficial examination of the file, without examining all the evidence.

30. The court suggested seeking a new opinion from a specialised scientific institution. Moreover, the prosecutor was to provide the experts with specific questions aimed at establishing whether A.M. should have ordered the firefighters to remove the applicant from the vehicle in order to examine him properly, with an ECG monitor, and to have unrestricted access to the patient. The opinion was also to answer the question of whether the failure to order the immediate removal of the applicant from the wreckage had exposed him to immediate danger of loss of life or serious bodily injury. Furthermore, the experts were to explain whether A.M. had behaved in accordance with professional standards in emergency medicine and to refer to the arguments included in the internal opinion prepared by the Warsaw Regional Emergency Service. Finally, the opinion was to answer the question of whether it was possible to establish from the injuries sustained by the applicant whether he had actually been electrocuted. This issue was crucial in order to establish A.M.'s guilt of the alleged medical error of having wrongly pronounced the applicant dead.

31. On 17 December 2009 the prosecutor discontinued the proceedings for the fifth time. In his decision the prosecutor confirmed that A.M., having attempted to find the applicant's heartbeat and checked the reaction of his pupils to light, had declared him dead. The conditions at the scene had been difficult, with poor light and the applicant trapped in the wreckage. Under the circumstances his conduct had not presented any irregularities and had not amounted to an offence.

32. On 29 January 2010 the applicant lodged a subsidiary bill of indictment (*subsydiarny akt oskarżenia*) with the Warsaw Praga-Południe District Court against A.M. and W.K. (the firefighter).

33. On 25 May 2010 the Warsaw Praga-Południe District Court (case no. IV K 108/10) discontinued the proceedings, arguing that W.K. was not a person of interest for the investigation and that A.M. had not committed an offence.

34. The applicant lodged an appeal against this decision.

35. On 26 August 2010 the Warsaw Regional Court (*Sąd Okręgowy*) quashed the part of the decision concerning A.M. and remitted the case. It upheld the decision to discontinue the investigation concerning W.K.

36. Hearings took place before the Warsaw Praga-Południe District Court on 21 December 2011, 30 March, 25 April, 18 July and 29 October 2012, 7 January, 14 March and 21 May 2013, 12 March, 26 May, 24 June, 5 September and 28 November 2014, and 29 January and 27 February 2015.

37. On 24 June 2013 the court ordered a medical expert opinion from the Jagiellonian University Institute of Forensic Research in Cracow. It was submitted to the court on 13 January 2014 (see paragraph 54 below).

38. On 6 March 2015 the Warsaw Praga-Południe District Court convicted A.M. under Article 160 §§ 2 and 3 of the Criminal Code of exposing the applicant to immediate danger and sentenced him to six months' imprisonment, suspended for two years.

39. The court established, based on the above-mentioned expert opinion of 13 January 2014, that A.M., despite his medical knowledge, had chosen not to have the applicant removed from the car in order to perform a proper general examination and had pronounced him dead based on a superficial examination through a smashed car window. The court dismissed the opinions prepared in the course of the investigation on the grounds that they were contrary to the evidence collected, full of contradictions and contained statements that an expert should not make.

40. The prosecutor and A.M. appealed against the judgment of 6 March 2015.

41. On 22 February 2016 the Warsaw Regional Court quashed the challenged judgment and discontinued the proceedings because the offence had become time-barred (the ten-year limitation period had expired on 3 January 2016). At the same time the court accepted as correct all the findings and conclusions of the first-instance court. It also concluded that there had been no grounds to acquit A.M. Finally, it was noted that the only reason the proceedings had not ended in December 2015 was because the accused had twice failed to appear before the court, submitting medical certificates to justify his absence. For those reasons the court ordered him to reimburse the costs of the appellate proceedings to the applicant.

42. On 29 April 2016 the applicant's lawyer lodged a cassation appeal.

43. On 24 November 2016 the Supreme Court dismissed it as manifestly ill-founded.

IV. PROCEEDINGS UNDER THE 2004 ACT

44. On 25 October 2011 the applicant lodged two complaints with the Warsaw Praga-Południe District Court under section 5 of the Law of 17 June 2004 on complaint about a breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay (*ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki* – "the 2004 Act").

45. On 8 December 2011 the Warsaw Regional Court refused to consider his complaint concerning the length of the investigation on the grounds that it had been lodged out of time.

46. On 16 December 2011 the court partially allowed his second complaint concerning the length of the proceedings before the Warsaw Praga-Południe District Court and awarded him 2,000 Polish zlotys (PLN). The court noted that since the lodging of the bill of indictment the court had not dealt with the case effectively. After the case had been assigned to a judge on 7 September 2010 no actions had been taken for fifteen months, until the scheduling of the first hearing on 21 December 2011.

V. EXPERT EVIDENCE

47. On 9 January 2006 an internal team of doctors supervised by the director of the Warsaw Regional Emergency Service prepared an opinion on the events. They stated that A.M. had not complied with the correct medical procedure for pronouncing the death of a person trapped in wreckage. In the case of a young man who had not been removed from his car at night, death could not be established from a lack of signs of life like breathing or having a pulse. The correct approach involved removing the victim and commencing resuscitation. Death could be pronounced on the basis of the results of tests using an electrocardiogram (ECG) monitor, which ambulances carried as standard equipment.

48. In the course of the disciplinary proceedings, in March 2006, medical opinion was prepared by A.Z., the Regional Consultant in Emergency Medicine. He considered that A.M. had acted correctly, as there were no generally accepted standards in similar circumstances.

49. On 12 September 2006 the prosecutor obtained an expert opinion from the same expert, A.Z., who reiterated the conclusions he had made in the disciplinary proceedings. He considered that there had been no medical malpractice in the way A.M. had handled the rescue operation following the applicant's accident. He considered that A.M. had not been competent to order the removal of the victim from the car as this was within the remit of the firefighters.

50. On 7 August 2007 the prosecutor obtained an expert opinion from J.K., the National Consultant in Emergency Medicine from Lublin Medical University. J.K. considered that A.M. had behaved correctly and his examination had been sufficient under the circumstances. He concluded that the applicant had suffered serious brain damage because of his accident and there was no link with how A.M. had behaved during the rescue operation.

51. On 9 March 2009 the prosecutor received the expert opinion by J.J. from the Emergency Medicine Department of Wrocław Medical University. It focused on some shortcomings in the

organisation of the emergency operation, which had made A.M.'s work less effective. The expert concluded that A.M. had behaved correctly, as he had ordered the removal of the applicant from the car. However, the execution of his order had been postponed because of the risk of electrocution and the necessity to wait for a prosecutor.

52. On 14 July 2009 an expert from Wrocław University of Science and Technology, Institute of Electronics, L.D., supplemented his opinion of 30 June 2009 concerning the aspects of the accident relating to the dangers posed by the broken electricity pylon and stated that the threat of electrocution had been real, and it had been correct to disconnect the electricity supply. However, the expert criticised the amount of time that had elapsed between receiving the information about the necessity to disconnect the electricity supply and the execution of this request. In the meantime, a properly equipped, trained person could have limited the danger and allowed faster access to the victim. The expert considered that the electrical cable hanging above the car should have been removed with the use of standard equipment carried by firefighters, and then an ammeter could have been used to measure whether the car still had current passing through it. This would have allowed safe access to the victim, although completely removing the electrical hazard would only have taken place on disconnecting the supply.

53. On 9 December 2009 another expert opinion by J.J. was issued which pointed out clear shortcomings in the organisation of the emergency operation, for which A.M. had not been directly responsible. The opinion also stated that he should have been more forceful in recommending that the applicant be pulled out of the car for examination.

54. On 13 January 2014 experts of the Jagiellonian University Institute of Forensic Research issued an opinion. They concluded that A.M. had not behaved correctly, as such an important medical conclusion as pronouncing someone dead could only be made following a direct examination of the victim. However, A.M. had failed to carry out such an examination, even though there had been no visible severe external injuries that could have justified not performing one (for instance, limb amputation, serious crush injuries to the body, visible head/brain injuries). Answering the question whether A.M. had behaved correctly, the experts concluded:

"Therefore, in view of the absence of any visible external injuries, to pronounce the victim dead based only on the lack of his pupils' reaction to light was a mistake. In the circumstances, the accused should have immediately extracted the victim of the accident from the wreckage in a secure manner after immobilising his head with a cervical collar, placed him on the spinal board, examined his vital functions, connected him to an ECG monitor [for further examinations of heart and lung functions] ... In the case of an absence of vital body functions, all necessary life-saving procedures possible under the circumstances should have been taken and the patient immediately transferred to a hospital. To rely only on a lack of reaction to light was a mistake and such a lack of reaction of the pupils only points to damage to cerebral tissue, not to the person's death, and is not one of the clear indications of death."

The experts answered the second question on whether such a mistake could amount to the offence proscribed by Article 160 § 1 of the Criminal Code. They concluded:

"Refraining from providing the applicant with emergency first aid in view of the absence of clear [injuries and justified indications that the victim of the car accident was dead] amounted to exposing him to immediate danger of loss of life or serious bodily injury."

VI. CIVIL PROCEEDINGS

55. In January 2009 the applicant initiated civil proceedings for compensation against the Emergency Services and A.M. The applicant sought PLN 2,500,000 for pecuniary and non-pecuniary damage in connection with the events of the case.

56. The Warsaw Regional Court sought several medical expert opinions and held hearings. The proceedings are still pending before that court.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

57. The relevant provisions of the Criminal Code provide as follows:

Article 160 (exposure to immediate danger)

"1. Anyone who exposes a human being to an immediate danger of loss of life, serious bodily injury, or a serious impairment of health shall be subject to the penalty of deprivation of liberty for up to three years.

2. If the perpetrator has a duty to take care of the person exposed to danger, he shall be subject to the penalty of deprivation of liberty for a term of between three months and five years.

3. If the perpetrator of the act specified in §§ 1 and 2 above acts unintentionally he shall be subject to the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to one year."

Article 101 § 1 (statute of limitations)

"Punishment for an offence shall be subject to limitation if, from the time of commission of the offence, the [following] period has expired:

(1) Thirty years – if an act constitutes the serious offence [*zbrodnia*] of homicide;

(2) Twenty years – if an act constitutes another serious offence;

(2a) Fifteen years – if an act constitutes an offence making the offender liable to a sentence of imprisonment exceeding five years;

(3) Ten years – if an act constitutes an offence making the offender liable to a sentence of imprisonment exceeding three years;

(4) Five years – in respect of other offences.

..."

Pursuant to Article 102, if during the limitation periods referred to in Article 101 § 1, an investigation against a person has been opened, punishment for offences specified in (1)-(3) of that

provision is subject to limitation after the expiry of ten years, and for other offences after the expiry of five years, after the end of the relevant periods.

58. A detailed description of the relevant domestic law and practice concerning remedies for excessive length of judicial proceedings – in particular, the applicable provisions of the 2004 Act – are set out in the Court's decisions in *Charzyński v. Poland* ((dec.), no. 15212/03, §§ 12-23, ECHR 2005-V) and *Ratajczyk v. Poland* ((dec.), no. 11215/02, ECHR 2005-VIII), and in its judgments in *Krasuski v. Poland* (no. 61444/00, §§ 34-46, ECHR 2005-V) and *Rutkowski and Others v. Poland* (nos. 72287/10 and 2 others, §§ 75-107, 7 July 2015).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

59. The applicant complained under Articles 2, 3, 5 and 13 of the Convention that the authorities had failed both to protect his right to life and to carry out an effective and thorough investigation into his allegation of medical negligence.

60. Being the master of the characterisation to be given in law to the facts of the case, the Court is not bound by the characterisation given by the applicant or a Government (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018). The Court considers that the applicant's complaints should be examined from the standpoint of Article 2 under its substantive and procedural aspects. The relevant part of that provision reads as follows:

Article 2

"1. Everyone's right to life shall be protected by law. ..."

A. Admissibility

61. The Government submitted that the application was premature as the civil proceedings initiated by the applicant were still ongoing. A civil claim for damages was an effective remedy which could still offer the applicant a possibility to obtain compensation. Secondly, the Government submitted that the case was incompatible *ratione materiae* with Article 2 of the Convention, as it did not concern the use of lethal force by agents of the State or a long-term life-threatening disease.

62. The applicant disagreed with the Government and maintained that his application was admissible. In particular, the criminal proceedings against A.M. had been terminated and his complaint to the Court had been lodged within the six-month time-limit. The gist of his complaints concerned the State's failure to comply with its positive procedural obligations under Article 2 of the Convention in the criminal proceedings concerning medical malpractice against A.M.

63. With regard to the applicability of Article 2 to the present case, the Court reiterates that the protection of this provision of the Convention may be invoked in circumstances other than the death of a victim of violent acts by agents of the State. Article 2 also comes into play in situations where the person concerned was the victim of an activity or conduct, whether public or private, which by

its nature put his or her life at real and imminent risk and he or she has suffered injuries that appear life-threatening as they occur, even though he or she ultimately survived (see, among others, *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 140, 25 June 2019; *Makaratzis v. Greece* [GC], no. 50385/99, § 55, ECHR 2004-XI; and *Soare and Others v. Romania*, no. 24329/02, § 108, 22 February 2011). In the present case the Court notes that the applicant was a victim of a serious car accident and during the rescue action he was pronounced dead by a doctor (see paragraph 9 above). The applicant survived the accident, was transferred to a hospital in a critical condition, and remained in a coma for at least a month. He sustained a severe brain injury and remains permanently disabled (see paragraph 14 above). In these circumstances, the Court concludes that the applicant's life was at imminent risk and that Article 2 of the Convention is therefore applicable to this case.

64. As regards the exhaustion of domestic remedies, the Court observes that the Polish legal system provides, in principle, two avenues of recourse for victims, namely civil proceedings and a request to the prosecutor to open a criminal investigation. The applicant actively participated in the criminal investigation and trial against the doctor who he had accused of medical malpractice. This set of proceedings ended in 2016. Moreover, the applicant lodged a civil claim for compensation which has been ongoing since 2009. The Government's objection that the applicant should have waited for the termination of the civil proceedings before lodging his application with the Court is closely linked with the examination of the question of whether the State can be said to have complied with its procedural obligations under Article 2 of the Convention (see, for instance, *Mojsiejew v. Poland*, no. 11818/02, §§ 37 and 42-43, 24 March 2009, and *Nicolae Virgiliu Tănase*, cited above, § 103).

65. In the light of the above, the Court joins the Government's plea of inadmissibility based on the premature nature of the applicant's application to the merits of the case and dismisses the remainder of the Government's preliminary objections.

66. It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The substantive aspect

(a) The parties' submissions

67. The applicant submitted that the emergency services had failed to immediately remove him from the wreckage of his car and provide first aid. The delay of two hours in providing him with effective medical assistance had put his life in imminent danger and had had very serious consequences for his health. Although the ambulance crew and firefighters had arrived immediately after the accident, they had not extracted him from the wreckage due, firstly, to their incorrect assessment that the car had had an electric current passing through it. However, the evidence collected showed that the electrical cable hanging above the wreckage could easily have been cut off by a trained person using the standard equipment in firefighters' vehicles. That would have neutralised the potential risk of electrocution. Secondly, the fact that A.M. had pronounced him dead

had jeopardised the whole rescue operation, as the members of the emergency services had no longer been in a hurry to get him out of the wreckage. As a result of these errors, he had been provided with adequate medical attention only some two hours after his accident. During this time, he had been unconscious, subjected to low temperatures and, at least for some of the time, to an electric current. The applicant emphasised that the expert opinions collected by the criminal court clearly confirmed that A.M. had not behaved correctly and had put his life in danger.

68. The applicant underlined that following the accident he had been in a coma for many months and had suffered severe brain damage. He had become tetraplegic and was no longer able to speak.

69. The Government submitted that the State had fulfilled its duty to ensure the effective functioning of the regulatory framework designed to provide effective and timely assistance to persons whose life was in danger as a result of an emergency. They considered that the present case did not concern any of the exceptional situations when actions or omissions of healthcare providers could engage the substantive responsibility of the State under Article 2 of the Convention. Firstly, the applicant had not knowingly been denied emergency medical treatment when he had been incorrectly pronounced dead; also, the rescue operation had been an overall success, as the applicant's life had been saved. They drew attention to the objectively very difficult conditions of the rescue operation, which had taken place at night, in winter, and with the risk of electrocution from the hanging electrical cable. These conditions had also added to the length of the rescue operation.

70. The Government provided detailed information on the legislative framework which constituted the basis for the functioning of the national emergency services. The scope of their actions, the standard equipment and principles of operation were all set out in relevant domestic laws. Twenty years ago, Poland had introduced a standardised programme for a modern medical emergency system set up as a specialised, independent, medical discipline functioning within the healthcare system. The medical emergency system was integrated with other emergency services, such as the fire brigade, chemical response team and the police, using a common emergency communication system and based on common integrated rescue notification centres. However, no legislative regulatory framework could be so specific as to regulate in a detailed way the professional standards for providing emergency help in every situation. Some margin had to be left to professionals to allow them to adapt their conduct to unpredictable situations. As stated by the Regional Consultant in Emergency Medicine at the material time, there had been no standard medical procedure in a case, such as the one under consideration, where the victim was trapped in a car in adverse weather, at night and with the risk of electrocution.

(b) The Court's assessment

(i) General principles

71. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of*

Judgments and Decisions 1998-III, and *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 29, 19 December 2017).

72. In the context of alleged medical negligence, the States' substantive positive obligations relating to medical treatment are limited to a duty to regulate, that is to say, a duty to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I, with further references, and *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 105, 31 January 2019).

73. Even in cases where medical negligence has been established, the Court would normally find a substantive violation of Article 2 only if the relevant regulatory framework had failed to ensure proper protection of the patient's life. The Court reaffirms that where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (see *Lopes de Sousa Fernandes*, cited above, § 187, with further references).

74. On the basis of this broader understanding of the States' obligation to provide a regulatory framework, the Court has accepted that, in the very exceptional circumstances described in *Lopes de Sousa Fernandes* (cited above, §§ 191-96), the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of healthcare providers (ibid., § 190).

(ii) Application of the general principles to the present case

75. The Court observes that in the instant case the applicant did not allege that the emergency services intentionally provided him with inadequate first aid. The applicant raised several complaints concerning the manner in which the rescue operation had been carried out, the essence of which was that he had been hastily pronounced dead without a full medical examination. This, in his submission, had amounted to medical malpractice on the part of A.M. According to the applicant, these errors and omissions had resulted in a delay in providing him with medical attention which had put his life at immediate risk and caused irreparable damage to his health.

76. In this context the Court notes that the course of the rescue operation after the applicant's road accident has been subjected to domestic scrutiny. The assessment of the actions of the firefighters and the doctor was not straightforward, as some medical expert opinions reached contradictory conclusions. It should be noted that A.M. did examine the applicant, albeit in a manner ultimately considered to be inadequate, and remained at the scene together with the police and firefighters. Once his error had been noticed, the ambulance was called back, the firefighters removed the applicant from the wreckage and medical attention was provided to him. He was immediately transferred to hospital, where further medical treatment was provided to him. In the disciplinary proceedings, the authorities did not establish any error in the way in which A.M. had

examined the applicant. However, the criminal court accepted the opinion of the experts from the Jagiellonian University Institute of Forensic Research in Cracow that it had been incorrect for A.M. not to have had the applicant removed from the car in order to perform a full general examination and to have pronounced him dead on the basis of a superficial examination through a smashed car window (see paragraph 54 above). The Court takes note of the fact that the conviction of A.M. at first-instance was quashed as time-barred by the appellate court (see paragraph 41 above).

77. In these circumstances, even assuming that the applicant could be considered as having received deficient, incorrect, or delayed treatment, it cannot be concluded that the emergency services knowingly put his life in danger by denying him access to life-saving emergency treatment (compare and contrast *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, § 104, ECHR 2013).

78. In view of the above considerations, the Court takes the view that the present case concerns allegations of medical negligence. In these circumstances Poland's substantive positive obligations are limited to the setting-up of an adequate regulatory framework compelling emergency services and hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives (see *Lopes de Sousa Fernandes*, cited above, §§ 187 and 203).

79. The Court notes that the applicant has not alleged any systemic or structural dysfunction in the emergency services of which the authorities should have been aware and which resulted in him being deprived of adequate first aid (see *Asiye Genç v. Turkey*, no. 24109/07, § 97, 27 January 2015). The Government submitted information pertaining to the legal framework of the medical emergency system in Poland and the functioning of the rescue notification centres (see paragraph 70 above).

80. Regard being had to the above, the Court considers that the relevant regulatory framework does not disclose any shortcomings as regards the State's obligation to protect the right to life of the applicant.

81. Accordingly, there has been no violation of Article 2 of the Convention in its substantive aspect.

2. The procedural aspect

(a) The parties' submissions

82. The applicant submitted that Article 2 had been violated in his case. The criminal proceedings had been exceedingly lengthy, as A.M. had been convicted at first instance only ten years after the events. Such a lack of effectiveness had resulted in total impunity for him, in that his conviction had been quashed as time-barred. The criminal investigation and judicial proceedings had been characterised by delays, inefficiency, and a lack of diligence in collecting and examining the evidence.

83. The applicant emphasised that the main issue raised by the application had been the authorities' inadequate response to his allegations that A.M. should have been held criminally liable for his failures in providing him first aid. The civil proceedings, which were still ongoing, could not

remedy the shortcomings and delays that had occurred during the more than ten years the criminal proceedings had lasted.

84. The applicant further submitted that the lengthy examination of his allegations of medical malpractice had not taken into account what had been at stake in the proceedings. The consequences of the accident and the emergency services' failure to provide him with adequate medical assistance had been devastating to his life and to his entire family. At the time of the accident, the applicant had been a law student and would by now have been exercising a profession. However, he was presently totally dependent on the help of others, tetraplegic and unable to speak. Moreover, participating in multiple proceedings in the period of the last fourteen years had inflicted substantial pecuniary and non-pecuniary damage on the applicant and his family.

85. The Government considered that the investigation and the judicial proceedings into the allegations of medical malpractice had been effective and thorough and that there had been no violation of Article 2 of the Convention. The investigation had been aimed at establishing the causes of the applicant's accident and possible shortcomings in providing him with first aid after the accident. The prosecutor had instituted the investigation of his own motion and it had started already at the scene of the accident on 3 January 2006. The allegation of medical malpractice had been examined by the prosecuting authorities, who had collected medical documentation, sought expert opinions and secured further evidence.

86. The expert material had been complex and had included evidence from several fields of medicine and power engineering. The expert opinions had been divided on whether A.M. had behaved correctly. The Government acknowledged that the investigation had been discontinued on four occasions by the prosecutor. On three occasions, it had then been resumed following appeals by the applicant, which proved that his procedural rights had been respected. In sum the Government considered that the overall length of the proceedings had been due to the necessary process of collecting the evidence, which had been out of the authorities' control.

87. The Government further noted that the issue of the extent to which the damage to the applicant's health had been caused by the accident itself, independent of the manner in which the rescue operation had been carried out, would be established in the civil proceedings. These proceedings were currently ongoing.

(b) The Court's assessment

(i) General principles

88. The Court has interpreted the procedural obligation of Article 2 in the context of health care as requiring States to set up an effective and independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible held accountable (see, among other authorities, *Lopes de Sousa Fernandes*, cited above, § 214, and *Šilih v. Slovenia* [GC], no. 71463/01, § 192, 9 April 2009).

89. The form of investigation required by this obligation varies according to the nature of the interference with the right to life. While, in some exceptional situations, where the fault attributable

to the health-care providers went beyond a mere error or medical negligence, the Court has considered that compliance with the procedural obligation must include recourse to criminal law, in all other cases where the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective and independent judicial system does not necessarily require the provision of a criminal-law remedy. In cases concerning unintentional infliction of death and/or lives being put at risk unintentionally, the Court reiterates that the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained. Where agents of the State or members of certain professions are involved, disciplinary measures may also be envisaged (see, among other authorities, *Calvelli and Ciglio*, cited above, § 51; *Vo*, cited above, § 90; *Šilih*, cited above, § 194; *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 132; and *Lopes de Sousa Fernandes*, cited above, §§ 137 and 215).

90. Moreover, the compliance with the procedural requirement of Article 2 is to be assessed on the basis of several essential parameters. These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the requirements for a fair trial under Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of promptness and reasonable expediency, must be assessed (see *Nicolae Virgiliu Tănase*, cited above, § 171, with further references). The essential parameters include the following (ibid. §§ 166-68):

a) the investigation must be thorough, which means that the authorities must take all reasonable steps available to them to secure the evidence concerning the incident, always make a serious attempt to find out what happened and not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions;

b) even where there may be obstacles or difficulties preventing progress in an investigation, a prompt response by the authorities is vital for public safety and in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts. The proceedings must also be completed within a reasonable time;

c) it is generally necessary that the domestic system set up to determine the cause of death or serious physical injury be independent. This means not only a lack of hierarchical or institutional connection but also a practical independence implying that all persons tasked with conducting an assessment in the proceedings for determining the cause of death or physical injury enjoy formal and *de facto* independence from those implicated in the events.

91. In a case such as the present one, where various legal remedies, civil as well as criminal, are available, the Court will consider whether the remedies taken together as provided for in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. The choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring Convention

rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still have fulfilled its positive duty by other means (see *Tănase*, cited above, § 169, and *Lopes de Sousa Fernandes*, cited above, § 216).

92. The Court reiterates that in medical malpractice cases the Court's role is to assess whether, in the concrete circumstances of the case, given the fundamental importance of the right to life guaranteed under Article 2 of the Convention, and the particular weight the Court has attached to the procedural requirement under that provision, the legal system as a whole dealt adequately with the case at hand (see *Lopes de Sousa Fernandes*, cited above, § 225, with further references).

(ii) Application of the general principles to the present case

93. The Court observes that in Poland there existed in principle two avenues, civil and criminal, for victims alleging illegal acts attributable to the State or its agents (see paragraph 64 above and among many other authorities, *Z v. Poland*, no. 46132/08, § 70, 13 November 2012). Moreover, in the present case, the applicant could also request to institute proceedings in order to establish the disciplinary liability of the medical practitioners concerned by initiating a procedure provided for by the laws governing the professional liability of physicians (see *Byrzykowski v. Poland*, no. 11562/05, § 106, 27 June 2006).

94. On this basis the Court concludes that the Polish legal system offers litigants remedies which, in theory, meet the requirements of the procedural obligations under Article 2. The applicant has not argued otherwise.

95. In the case at hand the applicant used all the above-mentioned remedies. The Court will therefore examine whether the domestic system as a whole, when faced with an arguable case of medical negligence, provided adequate and timely response consonant with the State's obligations under Article 2 of the Convention (see *Lopes de Sousa Fernandes*, cited above, § 238).

96. The Court will first look at the criminal proceedings. The criminal investigation started directly at the scene of the accident; a prosecutor was called since the applicant had been pronounced dead by the doctor, A.M. Since, some 30 minutes later that diagnosis proved wrong, the prosecutor had ordered A.M. to submit to a breathalyser test to confirm his sobriety. On 16 January 2006 the Warsaw Praga-Południe District Prosecutor formally opened the investigation into the manner in which first aid had been provided to the applicant by the emergency services (see paragraph 21 above). The prosecuting authorities dealt with the case until 17 December 2009, when the District Prosecutor discontinued the investigation for the fifth time (see paragraph 28 above). The three decisions to discontinue the investigation were quashed by the regional prosecutor and one, on 29 October 2009, by the Warsaw Praga-Południe District Court (see paragraph 28 above).

97. The Court notes that the case was of some complexity and involved an assessment of whether the actions of A.M. had been adequate. While the Court accepts the authorities' assessment of the need for expert evidence in a case concerning medical malpractice, it notes that the time needed for its preparation contributed to the overall length of the investigation. The Court notes that in four years of investigation, the prosecutor requested and received four medical expert opinions in total (see paragraphs 49-51 above). All of the opinions excluded any medical malpractice on the part of A.M. and formed the basis of the prosecutor's decisions to discontinue the investigation since no offence had been committed. The Court considers that while expert opinions are a valuable element

of assessment, the authority seeking the opinion cannot be absolved from analysing whether the experts based their assumptions and conclusions on collected evidence. In the present case, it does not appear that the prosecutor analysed in any meaningful way the conclusions of the first three experts despite the fact that they clearly contradicted the evidence collected. The Court refers to the findings of the Warsaw Praga-Południe District Court which indicated the reasons why none of the three expert opinions collected between 2006 and 2009 could be considered as acceptable evidence (see paragraphs 29-30 above).

98. Within the legal time-limit, on 29 January 2010, the applicant lodged a subsidiary bill of indictment against A.M. (see paragraph 32 above). As regards the judicial stage of the proceedings, the Court points out that the trial court had been totally inactive for fifteen months before the first hearing was scheduled for 21 December 2011 (see paragraph 36 above). This was noticed by the court examining the applicant's complaint under the 2004 Act and the applicant was awarded the legal minimum in compensation (see paragraph 46 above). The trial court further ordered the preparation of one expert opinion from the Institute of Forensic Research in Cracow; it took the experts almost six months to prepare their opinion during which time the case lay dormant again (see paragraphs 37 and 54 above).

99. On 6 March 2015 the Warsaw Praga-Południe District Court gave judgment, finding A.M. guilty of exposing the applicant to immediate danger proscribed by Article 160 §§ 2 and 3 of the Criminal Code. This judgment was however quashed upon appeal, on 22 February 2016, for the sole reason that the offence had become time-barred some two months earlier (see paragraphs 38 and 41 above).

100. The Court recognises the complexity of the case concerning the alleged medical malpractice; nevertheless, ten years after the accident which left the applicant tetraplegic, and some six years after the applicant had lodged a subsidiary bill of indictment, the proceedings had to be discontinued as the charges against A.M. had become time-barred. In consequence, the applicant and his family, who had actively participated in the proceedings, lodging appeals against multiple decisions of the prosecutor to discontinue the investigation and pursuing the subsidiary bill of indictment, saw the first-instance conviction of A.M. quashed simply because the proceedings had gone on for too long.

101. The Court further notes that the civil proceedings for compensation have been ongoing for almost thirteen years before the first-instance court and that no ruling has been given (see paragraphs 55 and 56 above). The disciplinary proceedings against the doctor had also been discontinued on the basis of the opinion by the same Regional Consultant in Emergency Medicine who had prepared an opinion in the criminal investigation (see paragraphs 15-19 above).

102. The foregoing considerations are sufficient to enable the Court to conclude that the relevant mechanisms of the domestic legal system, taken as a whole, did not secure in practice an effective and prompt response on the part of the authorities consistent with the State's obligations under Article 2. It accordingly holds that there has been a violation of Article 2 in its procedural aspect.

103. It follows that the Government's preliminary objection (see paragraph 65 above) must be dismissed.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

105. The applicant claimed non-pecuniary damage in the amount of 120,000 euros (EUR).

106. The Government submitted that the applicant had failed to specify his claim.

107. The Court accepts that the applicant must have suffered non-pecuniary damage which cannot be compensated for by the finding of a violation of the Convention. Having regard to the circumstances of the present case, it awards the applicant EUR 26,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

108. The applicant also claimed EUR 5,000 in total for the costs and expenses incurred, without specifying whether the costs had been incurred before the domestic courts or before the Court. The applicant did not provide any bills or other evidence.

109. The Government contested the claim.

110. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Sargsyan v. Azerbaijan* (just satisfaction) [GC], no. 40167/06, § 61, 12 December 2017). In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's preliminary objection concerning non-exhaustion of domestic remedies and *dismisses* it;
2. *Declares* the application admissible;
3. *Holds* that there has been no violation of Article 2 of the Convention in its substantive aspect;
4. *Holds* that there has been a violation of Article 2 of the Convention in its procedural aspect;
5. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 26,000 (twenty-six thousand euros), in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 February 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Marko Bošnjak
Registrar	President