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## Determining Damage in the Hungarian Medical Law

### I. INTRODUCTION

In the era of the European legal harmonization, an ever-greater emphasis is placed upon researching how the rules of the private laws of the different European legal systems may be unified, and pertaining thereto, which are the common features of such European private laws. It is appropriate and advised to carry out researches in the widest scope possible, by examining each and every European legal system, as a planned and envisaged European Private Law Code shall be applied and incorporated into all of the legal systems of the participating states. Thereby, such different solutions may take prominence by the wider scope of research regarding the national laws, which were not yet paid due attention in the European comparative law works. These are such unique viewpoints that may take us closer to the process of European legal unification.

I intend to contribute to this work by my study, in which I shall be presenting the medical practitioners' civil liability in Hungarian law. I shall be outlining the system of the Hungarian law of damages; moreover, I shall be presenting the main principles of determining liability and the concept of damage, following the detailing of the core questions of medical law.

### II. RELATIONSHIP BETWEEN MEDICAL LAW AND CIVIL LAW

With respect to the relationship between doctor and patient, the Hungarian law does not form any independent type of contract, and neither does it contain any clear provision whether the relationship established between doctor and patient could constitute a contract or not. Opinions of academic authors regarding the contractual nature of the doctor-patient relationship also vary.<sup>[1]</sup> Nevertheless, the judicial practice is consistent in that this relationship is a contract formed by the concordant expression of intent of the parties. In particular, it is deemed a due care

[1] Dósa, 2010, 71.

obligation (obligation of means), compared to which the liability of the types of contract to produce a work (obligation of result) is exceptional.<sup>[2]</sup> This is also confirmed by the arguments of Máté Julesz.<sup>[3]</sup>

There can be no doubt as to the fact that the Hungarian law considers the relationship between doctor and patient as a relationship between equals under civil law, in which, apart from specific social security provisions and those of administrative law,<sup>[4]</sup> the rules of civil law apply. In this scope, Section 244, Subsection 2 of Act CLIV of 1997 on Health is of utmost importance. The reference rule of the Act clarifies that: “with respect to damages and claims which may be pursued due to the violation of personal rights, in connection with health-care services, the regulations of extra-contractual liability and the sanctions for violating personality rights of the Civil Code shall be applied accordingly.”

### III. THE CHARACTERISTICS OF LIABILITY FOR DAMAGE

The introduction of the abovementioned reference rule into the Civil Code (Act V of 2013, hereinafter referred to as Civil Code), entered into force on 15 March 2014, was required due to the recodification of liability for damage. The previously effective Act IV of 1959 (hereinafter referred to as previous Civil Code) had not established any relevant distinction between the rules of liability for damage caused by breach of contract (contractual liability) and extra-contractual liability (liability *ex delicto*).<sup>[5]</sup> Material and non-material (theoretical, moral) damages had also rested on the same foundations.

By comparison, the Civil Code establishes a different regulation in both aspects. Apart from incorporating some relevant developing principles of the judicial practice, the Act regulates the liability for damage according to the same approach as the previous Act: “A person causing unlawfully damage to another shall compensate for the damage caused. The person causing damage shall be exempted from liability if he proves that he was not at fault.” However, in the scope of liability for damage caused by breach of contract, the Civil Code established a more severe standard of liability than the previous Act, by also taking the provisions and concepts of the Vienna Convention on Contract for the International Sale of Goods into account. Under Section 6:142 of the Civil Code: “A person causing damage to the other party by breaching the contract

[2] Dósa, 2010, 72.

[3] Julesz, 2018, 201.

[4] For the purposes of Section 3, Paragraph f of the Act on Health, healthcare services in Hungary may only be provided on the basis of a licence issued by the health authority.

[5] Section 318, Subsection 1 of the previous Civil Code lays down: “The provisions of liability for damages independent of contract shall be applied to liability for breach of contract and to the extent of indemnification, with the difference that such indemnification may not be reduced, unless otherwise prescribed by legal regulation.”

shall be required to compensate for it. He shall be exempted from liability if he proves that the breach of contract was caused by a circumstance that was outside of his control and was not foreseeable at the time of concluding the contract, and he could not be expected to have avoided that circumstance or averted the damage.”

The rules on carrying out hazardous activities are regulated in the scope of liability *ex delicto*, which nonetheless may be considered exceptional from the viewpoint of assessing the medical practitioners’ liability for damage. Such exceptional case was determined by the Supreme Court in its judgment published in BH 2005.7.251: “the hospital is liable according to the liability rules governing damage caused by carrying out hazardous activities, if its doctors perform the disinfection with alcoholic chemicals before the patient’s surgery and if they use electric knives at the same time, by the application of which sparks are emitted that inflate the disinfecting chemical and consequently the patient suffers severe burn injuries.”<sup>[6]</sup>

It is the result of the choice of legal policy, that the rules of extra-contractual liability shall be applied to the medical malpractice legal actions. Similarly to liability for hazardous operations, liability for damage caused by breach of contract would establish such a case in which the exculpation of medical liability would become impossible. Consequently, in the course of assessing civil liability of the medical practitioners’, the courts shall always assume and take into account the rule of liability *ex delicto*, predominantly applying its general form.

#### 1) Grievance award

The essential change introduced by the Civil Code’s entry into force is the application of grievance award instead of non-material damages. This does not only mean a change in name from the viewpoint of the solution of Hungarian law. While the previous Civil Code placed the liability for the cause of non-material injury as an integral part of damages, the grievance award constitutes damages neither due to its name nor due to its scheme, rather it is a direct compensation by material satisfaction for violation of personal rights and a sanction of private law at the same time.<sup>[7]</sup>

Although the legal instrument is distinctive, pursuing thereof before the courts is not entirely separate from the rules on damages as pursuant to Section 2:52, Subsection 2 of the Civil Code “conditions of the obligation to pay grievance award, and in particular the identification of the person who is under the obligation to pay and the ways of exculpating him, shall be governed by the

[6] The name of the highest court of the Hungarian judicial system is Curia from 1 January 2012, which conforms better to the historical traditions.

[7] Vékás, 2012, 49.

rules on liability for damages, with the proviso that, apart from the fact of the violation, there is no need to prove further loss.” It should also be stressed that the courts shall adjudicate claims for grievance award and damages for the cause of the same harm in the same proceedings.

The fact that there is no need to prove further loss apart from the violation for the assessment of grievance award, introduced a shift in approach compared to the non-material damages as laid down in the previous Civil Code: “it establishes an irrebuttable presumption that any violation of personal rights necessarily means loss suffered on the part of the person injured”.<sup>[8]</sup> Nevertheless, it is naturally still in the interest of the plaintiff to prove the non-material loss in the wildest scope possible, although not in the scope of the legal basis, but rather, the amount thereof, as the court “may dismiss the statement of claim either due to the fact that the violation of personal right in question is not appropriate to cause non-material loss or due to the fact that it draws consequence from the assessment of acknowledged facts that no such injury occurred at the party whose personal rights were violated”.<sup>[9]</sup> It is evident from this wording that there is no symbolic penalization in Hungarian law, therefore the courts may disregard applying grievance award for petty violations. Nonetheless, the courts still have the possibility to determine the cause of injury according to the plaintiff’s claim as an objective sanction.

#### IV. THE CONCEPT OF DAMAGE IN THE CIVIL CODE

Neither the previous Civil Code nor the Civil Code offers a clear civil law definition of damage. For the purposes of Section 6:522, Subsection 1 of the Civil Code, “The person causing damage shall compensate the injured party for his entire damage.” The principle of full compensation provides the upper limit of the amount of damages as Hungarian law does not acknowledge punitive damages.

By applying the prohibition of material gain from damage, the civil law intends to achieve the objective that by pursuing a claim for damages, the person suffering damage should not realize a more favourable financial position than the one he would otherwise be in without the cause of damage. However, the second wording of Section 6:522, Subsection 3 of the Civil Code offers discretionary powers to the courts for examining whether the reduction of material gain arising from the cause of damage is justified or not. Such may be the case for material gain stemming from carrying out extraordinary work despite the reduction of the person’s capacity to work who suffered said damage; moreover, any donation, assistance, and aid provided due to the cause of damage also fall

[8] Vékás, 2008, 117.

[9] Judgement of the Curia published in BH.2016.241.

under this category.<sup>[10]</sup>

The Civil Code summarizes the types of damage to be paid in three categories. Under Section 6:522, Subsection 2 of the Civil Code:

(2) When providing full compensation, the person causing damage shall compensate for

- a) the diminution in the value of the assets of the injured party;
- b) the loss of profit; and
- c) the costs necessary to eliminate the pecuniary losses of the injured party.

The damage becomes due from its occurrence, irrespective of the fact whether the person suffering the damage or the person causing it is aware thereof. Apart from the grievance award, damages shall also be paid by providing pecuniary compensation.

## V. THE SPECIAL FEATURES OF DETERMINING DAMAGE IN MEDICAL LAW

According to the general rule of liability *ex delicto* of the Civil Code, for the determination of civil liability, the person suffering damage shall prove that 1) due to the unlawful conduct 2) of the person causing damage and not another person 3) he has suffered damage 4) and there is a causal link between the damage and the unlawful conduct. By comparison, the person causing damage may prove that the conduct causing damage is not attributable to him. For determining the medical practitioners' liability, these conditions shall be met cumulatively.

Pursuant to Section 244, Subsection 1 of the Act on Health "the healthcare provider is liable for any damage and violation of personality rights occurred in the course of medical care during healthcare services". This means that with respect to any damage caused during surgery in the hospital, the healthcare provider (hospital) shall be the defendant of the medical malpractice legal action and it shall be the one obligated to pay damages (grievance award), not the attending physician, irrespective of the manner of the physician's employment relationship at the service provider.

The Civil Code presumes that the cause of damage is unlawful. However, this in itself is not sufficient for the determination of liability, as there is no liability without damage. Therefore, we may certainly agree with the findings of ifj. (jr.) Zoltán Lomnici, that is, "in the absence of damage, there is no *locus standi* required for claiming damages".<sup>[11]</sup> Civil law sanctions the cause of damage, not the attributable conduct. I must also agree with the findings of Károly Benedek, that is, the occurrence of the result is an indispensable but not exclusive condi-

[10] Lábady, 2014, 276-277.

[11] Ifj. Lomnici, 2009, 188.

tion of damages: it is only fulfilled if the damage in fact occurs.<sup>[12]</sup> Should there be no damage or should the plaintiff fail to argue and prove such a violation, which constitutes damage according to the legal acts and the interpretation of judicial practice, then the litigation cannot lead to the intended legal consequence. Damage as the most relevant condition of sanction is at the centre of the theory of László Asztalos by the fact that civil law always draws conclusion back from the result whether there is an unlawful conduct in causal link thereof, which, should the other elements of liability be met, is appropriate to impose sanctions for any third party other than the person suffering damage.<sup>[13]</sup> Should there be no anomalous result, the examination of the causal link and the fault is also devoid of purpose. Nonetheless, emphasis shall be put on the fact that the exculpation of fault may be justified by examining the conduct causing damage, rather than the damage itself.<sup>[14]</sup>

Examining the causal link is one of the most relevant factors of the rules on damages of every legal system, as the connection between conduct causing damage and the damage itself may be interpreted in a broad scope from the category of factual causation (*conditio sine qua non*) to the different levels of legal connexion. The Civil Code does not lay down the method and benchmark of examining the causal link. In general, it can be established that the person suffering damage shall bear the burden of proof with regards to the causal link. However, in medical law cases, due to the information asymmetries between the parties, it would mean more difficulty for the patient to prove the causal link according to the general standard, therefore, in such scope of examination, the burden of proof seems to be reversed. According to the established judicial practice, the patient complies with its obligation of proving the causal link, if he provides evidence to the fact that the damage has occurred in the healthcare facility, during healthcare services.<sup>[15]</sup> In this case, the defendant shall prove that the damage has occurred for reasons not relating to healthcare services.<sup>[16]</sup> In its judgment Pfv.III.22.181/2011/8., the Curia offers a narrow possibility of exculpation for the healthcare provider: “the causal link required for determining liability for damages may only be excluded by proving that the deterioration of health would have inevitably occurred even in case of assessing correct diagnosis and performing appropriate treatment, and the plaintiff had no chance for his partial torn ligament to heal by so-called conservative (tailored) treatment, without permanent damage”. The special nature of adjudicating and proving medical activity serves as reason thereof, as the Supreme Court has established in its decision of principle 2003.863: “as there is no conclusive assessment from a medical viewpoint, the establishment of facts supported by evidence may also

[12] Fuglinszky, 2015, 46.

[13] Asztalos, 1980, 296.

[14] Fuglinszky, 2014, 47.

[15] Dósa, 2010, 114.

[16] Kiss, 2017, 1-17.

be interpreted at this lower level, and under Section 206, Subsection 1 of the Civil Code, it is suffice to have judicial discretion with regards to the grounds for exclusion, grounds for presumability and grounds that may be subject to exclusion for the proving of the legal concept of causal link and establishing the infectious source”.

Nonetheless, the patient may not be exempted from the burden of proof regarding the causal link according to the general rules if a long time has passed between the conduct causing damage (medical intervention) and the occurrence of damage (deterioration of health), and consequently, the abovementioned presumption may not be maintained.

According to the general rules of liability *ex delicto*, the person suffering damage shall bear the burden of proof regarding the fact that the person causing damage has in fact caused him damage. By comparison, the person causing damage may prove that he acted in accordance with the generally expected standard of conduct under the given circumstances. Pursuant to the provisions of the Civil Code, the person suffering damage shall not be obligated to bear the burden of proving the subjective elements with respect to the conduct of the person causing damage, this shall be relevant with regards to the exculpation of such person. The principle of the generally expected standard of conduct regulated in Section 1:4, Subsection 1 of the Civil Code provides a generally accepted standard, nevertheless, this does not mean that the courts should disregard the personal components regarding the person causing damage when assessing the possibility of his exculpation. “The generally expected standard of conduct varies when the subject of which is a layman, a professional, a sole proprietorship or a giant multinational corporation”,<sup>[17]</sup> set out Tamás Lábady, and the foundations of said finding also appears in Gaius’ *Digesta*, as it set forth that “professional ignorance constitutes negligence”.<sup>[18]</sup>

With regards to the generally expected standard of conduct of the physician, the Act on Health specifically provides for the increased level of such standard of conduct. Under Section 77, Subsection 3 of the Act “all patients, irrespective of entitlement to using healthcare services, shall be treated by all care providers with maximum care, in adherence of professional and ethical rules and guidelines”. It is a recurring error in litigation strategy that the defendants intend to exempt themselves from liability by arguing that they have complied with the professional and ethical rules and the guidelines during their procedures. Nevertheless, such procedures in themselves do not seem sufficient for someone to exempt himself from medical liability: “The standard of due care is broader than the compliance with professional, ethical rules and guidelines” - reasoned the Curia in the case of Pfv.III.21.946/2015/4. Beyond complying with professional and ethical rules and guidelines, the standard of due care shall be fulfilled, “patient care with the upholding of the laws is only a minimum requirement from

[17] Lábady, 2014, 2236.

[18] *Imperitia culpa adnumeratur* (Gai. D. 50, 17, 132.).

an expert”.<sup>[19]</sup> Furthermore, there can be no doubt as to the fact that the judgment of the proceeding court adjudicating the case at hand shall always extend to the examination of the particular attributable conduct according to which the liability of the defendant for damages is established, with respect to the fact that the attending physician himself selects the method considered appropriate from the scientifically recognised methods of examination and therapy, nonetheless, he is not liable for his choice.

We must also highlight the fact that the failure to comply with the obligation to document may directly serve grounds for the liability of the healthcare provider, as the documentation constitutes such means of proof which is appropriate for the healthcare provider to exempt itself from liability: “The defendant shall bear the burden of proof regarding the lack of documentation. Such omission does not serve as the facts of the case concerning the liability for damage, rather it means that the failure or lack thereof as unproven facts shall be borne by the defendant when examining exemption from liability.”<sup>[20]</sup> Judit Sándor also drew the attention thereto: “The party, whose conduct leads to the loss of evidence, is not entitled to any gains due to its or his fault.”<sup>[21]</sup>

## VI. SUMMARY

In my study, I have presented the civil liability of medical practitioners in the Hungarian legal system. In the course of establishing the standard of liability against physicians, the starting point of Hungarian law is the general rules of civil law, however, it also takes the special features of the relationship between doctor and patient into account.

As opposed to the application of the objective standard regarding damages caused by breach of contract, by offering the possibility of exemption based on fault, it contributes to the fact that the physician may avoid an impossible situation from the point of view of providing evidence if his conduct is such that he performs his obligations with due care, according to the rules and ethical standards. Nevertheless, the increased level of rules on generally expected standard of conduct and the partial reversal of proving causal link is still in accordance with the gravity of the doctor’s duties to be performed for the patient. It not only intends to observe cases disrupted by cause of damage and possibilities for restoration thereof from a legal viewpoint, rather it takes the parties to the legal relationship, the social significance, the object and final purpose of the legal relationship into account, that is, the indispensable efforts for the health of patients that must be supported by society.

[19] Hanti, 2013, 107.

[20] The Judgement of the Curia published in Pfv.III.20.559/2014/7.

[21] Sándor, 1997, 98.



By determining the standard of liability, Hungarian medical law may serve as an example for other legal systems, even for the establishment of a possible uniform judicial practice in the field of European private law.

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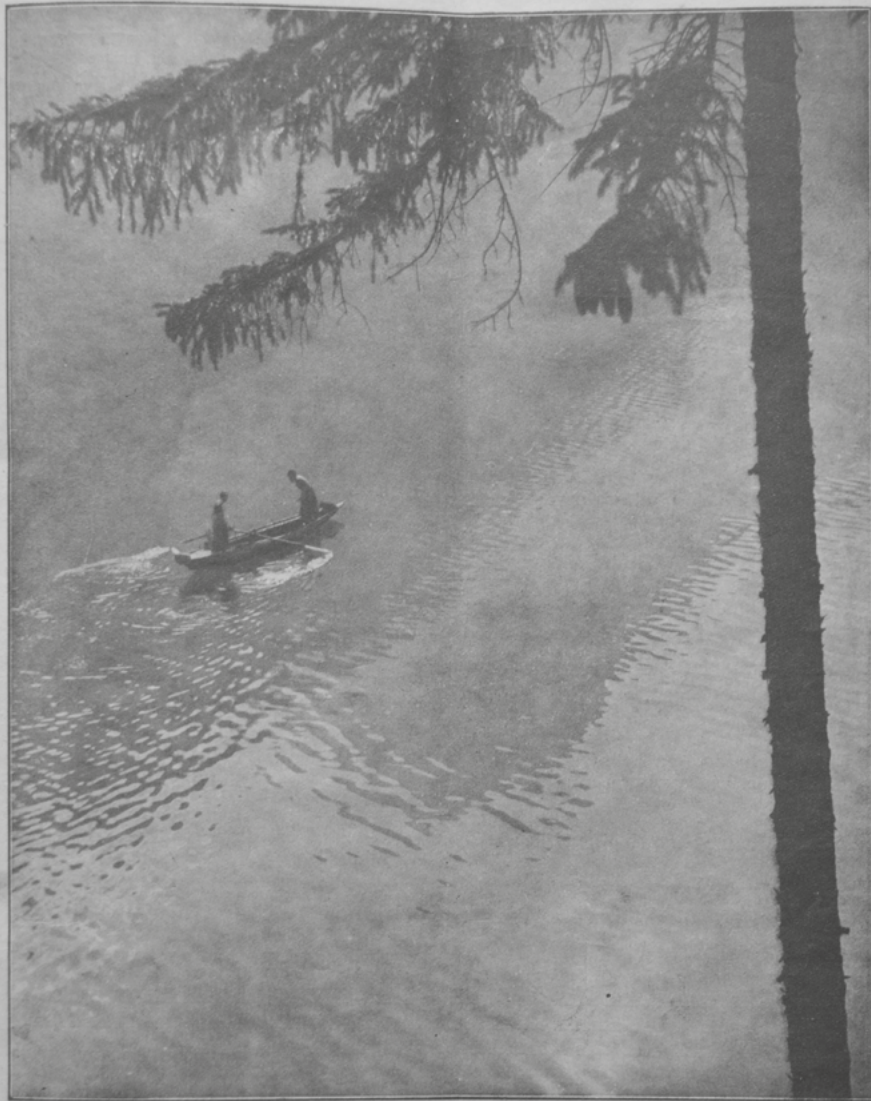
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