DE GRUYTER OPEN

DOI 10.1515/ptse-2015-0010 PTSE 10 (1): 107-114

# Medical Liability in the Light of New Hungarian Civil Code

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**Received: 01.10.2015; Accepted: 01.31.2015**

**Abstract**: *The number of medical malpractice lawsuits filed each year in Hungary has considerably increased since the change of regime. The judicial decisions and practices on determining and awarding wrongful damages recoverable for medical malpractices in the Hungarian civil law have been developing for decades.*

**Keywords**: law, legal education, health care, health education

In the early stage of medical malpractices it was unclear whether the courts had to consider either the contractual relationship between patients and healthcare providers (*contractual liability*) or general codal articles on damages arising from non-contractual liability/torts (*delictual liability*) in their judgement delivered in the cases (Szeghő, 2010). Both the theoretical and practical experience of the last ten years shows that healthcare services agreements are concluded between healthcare providers and patients with the aim and intention to provide appropriate professional healthcare services to patients, which meet patients' interests and wishes (Kemenes, 2008).

# *Contractual liability*

## *Contract for medical services*

Patients applying for treatment in the public care sector do *a contract for services, of a specific character. The contract is to be created between the patient and the health care service provider* (A Legfelsőbb..., 2010). In this situation the patient is the princpal and the (doctor or) hospital is the agent for the patient. The contract hasn't been expressly concluded, the contractual relationship is created by implied (concluding) conduct (Menyhárd, 2011:308). Contracts in the health care sector are specific because they are concluded for specific services and contain the rights and duties of the patients and the doctors or hospitals provided by the specific legislation.

These special features do not however result in differentiating them significantly in court practice from ordinary private law contracts. In professional legal literature it has been proposed that a *sui generis type of contract* (medical contract) should be viewed between the patient and the health care service provider (hospital) ruled by private law (Jobbágyi, 2005).

Thus, patients receiving the service from the public health care service provider are considered to be individual contracting parties to the public health care service provider. The price of the services is to be covered from the central budget of the National Health Insurance Fund. The National Health Insurance Fund in turn enters into financing contracts for specific health care services with health care service providers authorised to provide the service.[1]

Contracts and claims shall not be considered *in various* ways depending on whether they were launched against a *public or a private* health care service provider.

## *Contractual or delictual liability*

Thus medical treatment is provided on a contractual basis, so the medical service is violated if it fails to meet patients' interests and wishes as well as the objectives of the agreement. That is why we can assume that the liability of doctors and hospitals is a *contractual liability*.[2]

*In the older Civil Code (Act IV of 1959)* Hungarian tort law was *an unified system* applying the same rules for liability in tort and for breach of contract (Sándor, 1997:57).

In services contracts – like contracts for medical services – the obligations binding the obligee (the hospital or doctor) to act in compliance with the required standards but not to reach a certain result. Nevertheless in conjunction with medical malpractice cases this tendency was irrelevant. As a result, it could be established that *the required*

[1] Act no LXXXIII of 1997 on the Services of the Compulsory Health Insurance System, § 30.

[2] Court of Appeal of Szeged, Szegedi Ítélőtábla Pf. III. 20 308/2007 sz. - BDT2009 no 1944; Court of Appeal of Szeged, Szegedi Ítélőtábla Pf. III. 20 329/2007 sz. - BDT2009 no 1945

*standard of conduct* (or professional duty of care) in medical malpractice cases *in conjunction with contractual and non-contractual liability was the same*, so the differences between non-contractual and contractual liability were irrelevant in medical malpractice cases (Törő, 1986). This *could be* the reason why the courts did not emphasise the contractual nature of the legal relationship between the patient (client) and the medical service provider (agent).

Thus, patients *could* select between contractual and delictual liablity regimes as the basis of their claims. A reference to non-contractual liability seemed to be usually more favorable for them because of the system of reversed burden of proof:

- *in the context of non-contractual liability* the fault of the tortfeasor (health care service provider) was (and is) presumed and he had to prove compliance with the required standards of conduct in order to exonerate himself from liability,
- while under the *contractual liability regime* the patient victim had to prove that the obligee (doctor or health care service provider) breached the contract (didn't comply with the required duty of care and this resulted in a failure to achieve the desired result) (Menyhárd, 2011:310).

These can be the reasons for the fact that in medical malpractice cases the contractual nature of the relationship between the patient and the hospital seemed to be of secondary importance and is often left in the background.

However, the *new Civil Code (Act V of 2013) implies a stricter liability for damages in the case of breach of contract and stricter rules for exempting the party in breach from compensation obligations*. „The said party shall be relieved of liability if able to prove that the damage occurred in consequence of unforeseen circumstances beyond his control, and there had been no reasonable cause to take action for preventing or mitigating the damage."[3] So the opportunities to exempt healthcare providers from these obligations have become limited compared to previous regulations (Wellmann, 2013:235). So the legislature amended Health Care Law, which was aimed at further integrating the established judicial practices into legislation. The changing stipulates the application of the rules for liability for damages resulting from medical malpractice in non-contractual situations. So the rules of *delictual (tort) liability* must be applied in the future in medical malpractice cases despite of being contract between the patient and the medical service provider.[4]

[3] § 6:142 of the Act no V of 2013 on the Civil Code of the Hungarian Republic
[4] § 244 subpara (2) of the Act no CLIV of 1997 on Public Health Care

# *Tort (or Delictual) Liability*

## *Fundamentals of tort liability*

The basis of the Hungarian tort law is a general clause of liability. The basic norm of fault-based liability is provided as a general clause. But there are specific forms of liability also in the Hungarian tort law. These specific forms are covered by different forms of strict liability and liability for others (vicarious liability).

*The general provision on liability (as general rule of liability) provides that if any person who causes damage to another person wrongfully shall be liable for such damage. The tortfeasor shall be relieved of liability if able to prove that his conduct was not actionable: he acted as was generally expected under the given circumstances.*[5]

In the Civil Code there are specific rules for liability for damages caused by extremely hazardous activity, liability of minors, liability for employers, agents, judges, public prosecutors, animals etc. There is no special form of liability in connection with the liability of doctors, health care service providers or medical malpractice cases. Thus, medical malpractice cases, as a general rule, are to be determined according to the general provisions of fault-based liability (where fault is incompliance with the required standard of conduct). Specific cases of liability are to be applied only as long as it is established by specific relevant circumstances of the case (new-born baby was suffered burning injuries in the incubator). *So the preconditions of liability are*:

a) unlawfulness conduct,
b) the fault,
c) causal link between the tortfeasor's unlawfulness conduct and the suffered damage and
d) suffered damage.

In Hungarian tort law the *burden of proof is reserved*. In this system, the patient victim has to prove that he suffered damage (the fact of suffered compensable injury as well as the exact amount of damages) and that there is a causal link between the suffered damage and the tortfeasor's conduct. It is presumed unlawful conduct and fault.

## *Unlawfulness conduct*

First precondition of liability is *unlawfulness conduct, which is presumed*. As a general principle, all torts shall be considered unlawful and from this it follows that causing harm is always unlawful. The system of Hungarian tort law imply that all torts shall always be deemed unlawful unless - for example - the tortfeasor has committed the tort with the consent of aggrieved party, or by way of a lawful conduct, and such conduct does not violate legally protested interests of others, or if the tortfeasor is required by law to provide compensation.[6] Thus, the tortfeasor has to prove that he

[5] § 6:519 of the Act no V of 2013 on the Civil Code of the Hungarian Republic
[6] § 6:520 of the Act no V of 2013 on the Civil Code of the Hungarian Republic

caused the damage lawfully in order to exempt himself from liability (Hídvéginé Adorján & Sáriné Simkó, 2013:50).

## *The fault (it wasn't generally expected act)*

*The fault, as second precondition is presumed as well*: the tortfeasor health care service provider is liable unless he can prove that his conduct was *not actionable*: so he acted as was generally expected under the given circumstances. So, if the victim, patient proves that he suffered damage and there is casual link between the tortfeasor's conduct and the suffered damage, the tortfeasor will be liable. The tortfeasor shall be relieved of liability if able to prove that his conduct was not actionable: i.e. he acted according to the generally expected standard of conduct or if he proves that causing injury was lawful.

- There are itemized *professional standards and protocols* devised for almost all medical diagnostics procedures and interventions. In these protocols are laid down the indications of risks as well as the type of treatment in general. These professional standards also normally determine *the conduct, what is essential for required duty of care*. There are court decisions ruling that compliance with the professional guidelines and protocols results in compliance with the required duty of care and thus, an absence of fault (Menyhárd, 2011:297-298). Recently, however the Supreme Court established that *the absence of a breach of professional protocols, standards and guidelines does not rule out establishing fault*.[7] It is also sure however, *that violation of these protocols is sure to lead to establishing fault* and thus, liability. It might be said, that the required duty of care necessarily involves compliance with the professional standards. So that in most medical malpractice cases the necessity of appointing judicial experts and getting their opinion prevents a settlement of the procedure in a reasonable time (Hídvéginé Adorján & Sáriné Simkó, 2013:146-158).
- On the other hand the patient has the right to get all the relevant information in an individualised form. The patient's right to *informed consent* is the basis for the duty of the medical health care provider. Disclosure of risks associated with health intervention is sufficient if the information is individualised, contains all the information that can be relevant and takes into account the intellectual abilities of the patient. High risks must always be presented to the patient while risks occurring only by chance do not strictly subject to the disclosure requirement. Extremely serious risks, however, must always be discussed in detail even if the probability of their realisation is very small. The consent of the patient may prevent establishing the fault of the medical service provider only if the patient has adequately been informed before (Dósa, 2010:220-229).

[7] Court of Appeal of Szeged, Szegedi Ítélőtábla Pf. III. 20 267/2007 sz. - BDT2009 no 1943

## *Causal link*

In Hungarian tort law theory and practice used the „*but-for-test*", which required that in order to establish liability, the harm (damage) could not have occurred without the tortfeasor's conduct. The burden of proof rests on the victim, so if a *causal link* cannot be established, a precondition of liability is missing.

Courts however, have seemed to consider that the strict application of the „but-for-test" might result in a social injustice, as such, inappropriate risk allocation. In the past few years courts have seemed to find that increasing *the risk of happening of damage in itself might create* the causal link between the unlawfulness conduct and the suffered damage. This has led to – at least partially – establishing liability of health care service providers.

This new approach for allocating the risk of uncertain causation to the medical service provider has appeared only in medical malpractice cases but had still not been accepted as a general rule.

Nevertheless in the New Civil Code the causal link gained a new meaning: „*no causal relationship shall be deemed to exist in respect of any damage that the tortfeasor could not and should not have foreseen.*"[8] This „foreseeability clause" application will be extremely difficult in the malpractice cases. So I am looking forward to the judicial practice response (Hídvéginé Adorján & Sáriné Simkó, 2013:50).

## *Damage*

The fourth precondition of liability is *damage*. The tortfeasor shall compensate the aggrieved party for all his losses in full:

- *actual damage (damnum emergens)*: it is any depreciation in value of the property of the aggrieved party in spite of repairs,
- *lost pecuniary advantage (lucrum cessans)*: it is the lost salary, profit or alimony provided that it was legal and morally acceptable,
- *costs necessary* are the costs that were reasonably necessary for the mitigation or elimination of the financial losses sustained by the aggrieved party. This costs include expenses arising from the death (burial, tools for mourning etc.) or personal injury (costs of medical care, drug costs, and traffic expenses). But costs necessary are the repair charges and the costs of enforcing one's rights.[9]

The Older Civil Code (Act IV of 1959) itself didn't define compensable *non-pecuniary loss* and didn't give general rule for calculating the amount of compensation. In tort law - followed in court practice too – was that non-pecuniary loss could be created by violations of rights relating to personality. Although controversial issue was that the aggrieved person should have been entitled to claim non-pecuniary damages without proving any actual and real harm, costs or losses. Some court decisions

[8] § 6:520 of the Act no V of 2013 on the Civil Code of the Hungarian Republic
[9] § 6:520 of the Act no V of 2013 on the Civil Code of the Hungarian Republic, *A. Menyhárd* (fn 4) 313.

required a proven detriment arising from the violation of rights relating to personality in order to award compensation for non-pecuniary loss. However this approach excluded claims for compensating „bagatelle" harms. There have been also court decisions however, which awarded compensation for non-pecuniary loss only by reason of the violation of privacy rights, without proving detriment. So the theory and the practice was not clear and obvious (Dósa, 2010).

*The level of awarded compensation* for non-pecuniary loss was very different. There was no guideline for calculating the amount of compensation, but courts tried to award similar sum of compensation for similar non-pecuniary losses taking into account also relevant personal circumstances, especially the impact of the infringement upon the aggrieved party and his environment.

The *new Civil Code* introduced a new legal institution, which replaced the reimbursement of non-pecuniary damages. This is the *restitution*: any person whose rights relating to personality had been violated shall be entitled to restitution for any non-material violation suffered.[10] Despite of the restitution is regulated as a subjective sanction for violations of rights relating to personality, as regards the conditions for the obligation of payment of restitution the *rules on liability for damages shall apply*. This is especially true for the definition of the person liable for the restitution payable and the cases of exemptions. *Significant new feature of the restitution is that apart from the fact of the infringement no other harm has to be verified for entitlement to restitution* (Heiner & Barzó, 2014).

The court shall determine the *amount of restitution* in one sum, taking into account the gravity of the infringement, whether it was committed on one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.

Taking into consideration the current resources in staff and equipment available in healthcare, this regulation may promote claims for restitution impartial. Consequently, courts will have to apply other criteria when judgment in 'trivial cases', which might not require legal assessment, is delivered (Barzó, 2013).

[10] § 2:52 of the Act no V of 2013 on the Civil Code of the Hungarian Republic

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