



The possible effects of the new Hungarian civil code on the liability for damages of the healthcare service providers

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Abstract

The aim of my paper is to examine the possible changes by the new Civil Code of Hungary on the liability of the healthcare service providers. The liability system of the new Civil Code is much different at many points than the prior liability rules, it separates sharper the rules on torts and the rules on contractual liability, the liability of the damages caused by the breach of the contract is based on new, objective bases. The violation of personal rights is a frequently emerging problem in the health compensation procedures, so it is unavoidable to deal with the new sanction in the Code, the fee of injury too. In connection with the financing of the amounts for damages it is necessary to examine the obligatory liability insurance of the healthcare service providers and the main changes in the regulation of the liability insurance contracts of the new Civil Code.

Keywords: medical liability, medical malpractice, medical liability insurance, fee of injury, civil code of Hungary, healthcare service providers

Introduction

In Hungary, on the 15 March 2014 the new Civil Code entered into force and replaced the Civil Code from 1959. The aim of my paper is to examine the possible changes by the Act V of 2013 (hereafter: new Civil Code) on the liability of the healthcare service providers. I don't want to review every rule on liability from the new Civil Code, just the ones, which are relevant to my topic. So, I deal with the main changes of the liability system, the effects of these changes on the liability of the healthcare service providers, the new legal consequences for the violation of the inherent rights, the injury fee and the modified points of the liability insurance.

The main changes of the liability system

The liability system of the new Civil Code is much different at many points than the prior liability rules, main change that the set of the parallel rules between the criminal and the contractual liability has become narrower, and the separation of the rules on torts and the rules on contractual liability is sharper. The liability of the damages caused by the breach of the contract is based on new, objective bases, the possibilities for explanation are becoming stricter. Compensating the strict explanation system and increasing the cooperation, information between the parties, the tortfeasor must honor the lost profit and the damages, but such an extent that the injured party proves that the caused damages have been predictable at the time of conclusion of the contract.

Separating sharper the rules on torts and the rules on contractual liability in the new Civil Code is an acceptable, logical move, and this comply with the judicial practice^[1] and the international documents^[2]. The liability comes from different legal relations each case. In the case of liability of rules on torts the first base is an absolute legal relation, which becomes into a relative obligation between the injured party and the tortfeasor because of the tort. In this case, the general ban of the tort is injured. Contrarily, the conclusion of a

contract means a knowingly undertaken risk, in the case of breach of the contract there is the breaching of predetermined obligations between determined parties, and the breaching party has to honor these, and has to ensure the compensation of the caused damages. The patterns for the liability concept were the contracts in business relations. Anyone, who does businesslike activity, taking risks, in the case of breach of the contract the sanction can't depend on the sedulity of the breaching party, the reasonable behavior in the actual situation can't be sufficient base for the explanation.

Rules affecting the liability for damages of the healthcare service providers

The 244. § of the Act CLIV of 1997 (hereafter: Health Act) ordered from 1 January 2010, that the rules on compensation of the damages caused by the breach of the contract must be applied in the case of the liability of the healthcare service providers, and with this, ended the legal disputes on labelling the relation of the healthcare service provider and the patient. In the Civil Code of 1959 the set of the parallel rules between the criminal and the contractual liability was wide, the Subsection (1) of 318. § ordered to apply the rules on torts to the breach of the contract and to the compensation. The new Civil Code however, as mentioned before, means radical, conceptional changes for liability rules and these changes are seriously solicitous, considering the tendencies – existing in Hungary too - of the liability of the healthcare service providers for compensation. To prove this, a schematic review of the judicial practice of this special area is needed, which has changed significantly in the past 10 years. The judicial practice of this special area has changed significantly in the past 10 years. The producing reason was the promulgation of the Healthcare Act, its wide-ranging rights of patients have raised the patients and given them the chance to treat healthcare services consciously. The increase of the interest from the media, from the community in connection with healthcare

services, and the born of the law offices which are specialized to the representation of the plaintiff are the parts of the process. The biggest changes were in connection with the judgment of the relation of cause and effect and with the explanation from the chargeability. The changes are in the judgment of the requirements of liability by the judicial practice, in the change of the content of these requirements, and in the change in connection with the burden of proof. The part of the process is that burden of proof of the plaintiff has changed into be more favourable in connection with relation of cause and effect with the born of a minimum tendency of causality. The causality relation is the most disputed element from the requirements of liability, it has many uncertain elements, its statement, proof is very difficult in connection with the losses during healthcare services. The result of the process is influenced decisively that which part the uncertainty – in connection with causality – is charged to, by the court. Earlier it has been often charged to the patient, but at present the group of the facts – in connection with causality – which have to be proved becomes narrower. If the patient could prove that his/her damage has come into being during or after the handling, the causality would be presumed. The uncertain elements must be handled by the defendant in connection with the explanation from liability. Because of that, the possibilities of explanation for healthcare service providers became stricter, the liability moved towards the objective liability, in many cases the deficit of the professional infringement doesn't liberate the provider. Explanation is possible if the institution can prove beyond any doubt that it has worked with reasonable diligence, or prove that the damage would be origin even if it has worked with reasonable diligence.

We can see that the explanation is hard even in the imputation system for the healthcare service providers, because after the Health Act has entered into force the judicial practice has become harder more and more. The new, objective system of the liability for the damages from breaching the contract would have unforeseeable consequences if it was applied for this legal relation. The contractual relation between the healthcare service provider and the patient is a special area, for which the changes in the liability system – motivated by the contracts of the business area - aren't applicable fully. Just think for example the healthcare services within the confines of territorial attendance obligation – in these cases the institutions don't have deliberation possibility whether or whether not to conclude a contract with the patient, so they can't be exempted from the service obligation ^[3]. This is a significant difference compared to the business contracts, in these cases of the latter ones the contractual risk is a volunteer decision, so the increased liability is reasonable.

The legislator has recognized and remedied properly the problem with the changing the 244. § of the Health Act, which orders that the rules on breach of the contract – based on imputation – of the new Civil Code must be applied in the case of the liability of the healthcare service providers. But the technical solution of this undoubtedly necessary step creates questions. The mentioned section has made it obvious that there is a contractual relation between the healthcare service provider and the patient. The change of the referring rule has revoked the only rule which would say that this relation is contractual, so this would cause new disputes. If we accept the contractual aspect of this relation, the regulation has a logical paradox, because it orders to apply the rules on torts to a

contractual relation. Here, I mention that because of the priors, that would be better if the legislator – taking advantage of the possibilities created by the codification of the new Civil Code – had regulated the legal relation between the healthcare service provider and the patient as a substantive contract, or as a subtype of the contract of services. In this case the special rules of liability would be acceptable too.

The new regulation doesn't mean significant change in point of the preconditions of the liability for damages caused by the breach of the contract. The Code has explicit the general ban of the tort, the general illegitimacy of the tortfeasor behavior; this is new compared to the prior Code. Only the existence of the excused torts is an exception to the main rule, and these are now in one section. The new Civil Code – fitting in with the judicial practice – pulls up the payable damages with the rules of predictableness. The regulation revokes the relation of cause – without the relation of cause there isn't liability for damages – in the case of damage which hasn't been foreseen by the tortfeasor and he hadn't have to see it. Anticipating is an objective condition, so every damages must be compensated which can be foreseen by a person in the same situation as the tortfeasor ^[4].

Corresponds with the prior regulation, the part of the damage mustn't been compensated, which stems from the fact that the injured party didn't do his obligation for damage prevention and mitigation of damages ^[5]. However there is a new rule, the regulation of spread of losses between the injured party and the tortfeasor, in connection with the breach of the obligation for damage prevention and mitigation of damages. According to the rules, in this case the damage must be shared between the tortfeasor and the injured party first, in the ratio of their imputation, second, in the ratio of their interaction, and if these can't be determined, the damage must be shared equally. In the case of the compensation in connection with the healthcare services this regulation causes problem, because there is significant elements of uncertainty in connection with the causal relation. In many cases it is hard to determine the measure with that that the medical interference has contributed to the damage and it is hard to determine the measure with that for example the condition of the patient's organism, or his living, or his resistance against healing has contributed to the damage. The question is how will the judicature interpret the rule of spread of losses, how will determine the proportion of the imputation or the interaction, or will the judicature apply the third assistant rule?

In the case of the compensation of the damage – caused by many people together – there is the joint and several liability - corresponds with the prior regulation – which can be negligible by the court only if there is a circumstance deserving extraordinary equity, or the interaction of the injured party. In this case, the damage must be shared between the tortfeasors first, in the ratio of their imputation, second, in the ratio of their interaction, and if these can't be determined, the damage must be shared equally. The same rule is applied to the bearing the damages in the case of joint and several liability of the tortfeasors. The regulation dealing with the proportion of the imputation causes the same problems as were in the prior section. There is a new rule, that the regulation on common tort by many parties must be applied if the damage has been caused by many, concurrent behaviors and every of these behaviors could be able to cause the damage, or it can't be determined which behavior has caused the damage ^[6].

Contrary to the earlier regulation, in the new Civil Code the definition of damage doesn't contain the financial compensation, the tortfeasor must reimburse the depreciation, the lost profit and the costs necessary to eliminate the injuries. In connection with the criminal liability there is the complete compensation. For the manner of the compensation the new Code dispenses with the restoration of original condition – which has been the first manner – the monetary compensation is the main rule, except the case when the circumstances need nature compensation^[7] To judge this, the court isn't bounded to the claim of the injured party, but he can't apply a manner which is protested by both parties. The compensation is still due promptly in the time of the supervention of the damage, invariably. In connection with the liability of the healthcare service providers – beside the one-sum compensation – the sum which is granted regularly as benefit is often significant. The new Civil Code gives the opportunity for this, the court can determine benefit to pay it forwards periodically as a compensation for the regular future damages^[8]. There are special rules in the Code on the income-compensating and the support-compensating benefit too. The prior is justified by the loss of the benefit, so when the capacity for work of the injured party has reduced because of the damage and his benefit – not because of his imputation – doesn't reach the benefit of the prior tract of time. The claim for support-compensating benefit can be enforced at the time of the death of the injured party against the person who is ordered to pay the support. The regulation deals the support-compensating benefit as an exemption from the anticipation rule, so it must be paid by the tortfeasor, even if the consequence of his behavior wasn't predictable^[9]. The posterior main changes in the circumstances can be bases to alter, or to terminate the amount of the benefit, or to change the period of the pay.

Fee of injury: the new consequence for the violation of personal rights

The violation of personal rights is a frequently emerging problem in the health compensation procedures. So it is unavoidable to deal with the new sanction in the Code, the fee of injury, which promote the monetary compensation for these infringements after the termination of the non-material compensation.

From the personal rights which are in the new Civil Code, in connection with the healthcare services the violation of life, physical integrity and health often emerges, so as the violation of the human dignity and in connection with this, the violation of the rights of the patients. The former regulation in case of the violation of personal rights has applied the non-material compensation. The place of this compensation has been in the compensation topic and the collective liability terms for the material compensation have been needed to award it. The theories in the judicial practice have already provoked the fee of injury as an objective sanction in case of violation of personal rights, even as the main changes introduced by the new Civil Code. These theories have already dispensed with the demonstration of the disadvantage in case of non-material compensation, and have accepted as a commonly known fact that the violation of personal rights causes disadvantage^[10].

The new Code follows the so-called monist model from the possibilities of material sanction for personal rights. It terminates the non-material compensation, and separates the fee of injury from the compensation, and puts it in the chapter

on personal rights^[11]. The aim of the fee of injury is duplex, first, it gives an opportunity for the compensation with material instruments in the case of violation of personal rights, and second, it functions as a private law punishment^[12]. In the case of fee of injury the illegal behavior is in the centre, the fact of the infringement means the base for the claim, there is no need to prove the concrete disadvantage of the injured party. The main concept is the acceptance of that the violating behavior causes per se disadvantage, in serious cases causes psychic injuries in the injured person^[13].

Although the fee of injury isn't located among the rules of the compensation liability, the Code created a specific system when it put a reference of the rules of the compensation law for the defined features of the claims in connection with the fee of injury. The rules of the compensation liability are applied for the terms of the pay of the fee of injury, especially to the determination of the judgment debtor and to the manner of explanation. If we investigate its meaning in the aspect of the damage claims in connection with healthcare services, the institution will have to pay the fee of injury according to the rules of damage liability, not the tortfeasor, explanation will be able only if the supplier will be able to prove that his behavior wasn't imputed. This is a special feature, because the proof of the disadvantage isn't a term for enforcing the fee of injury, so this means that this is an objective sanction. But, the tortfeasor can offer an excuse with the proof of the lack of the imputed behavior, which is a subjective term.

The fee of injury can be judged as a one-off payment obligation, and although the proof of the disadvantage – beside the violation – isn't a condition for the order, but this proof can act the part of the determination of the amount of the fee of injury. The court determines the amount upon weighing the applicable circumstances. In this period, the load of the violation counts particularly. In this case the load of the violation, the effect of the violation on the injured person and his environment and the measure of the imputation can be very important^[14].

The introduction of the fee of injury as the sanction for violating the personal rights can cause surprising effects in the healthcare damage procedures. Because of the objective nature of it, the damage claims can increase, so in connection with the general problem of the fee of injury, the neglectable claims, the judicial discretion will have an important role^[15]. But the fact that during the determination of the fee the load of the violation and the measure of the imputation must be paid attention to, can be a favourable thing for the healthcare service providers, because the amount which has been paid earlier in the case of violation of personal rights as a non-material compensation can be lower. The reason of this is that in the procedures against the healthcare service providers the institutions are generally sanctioned not because of a serious imputed behavior, many times the reason is the impossibility of proving the reasonable diligence because of the lack of the documents, or reason are the problems of the information.

Besides the fee on injury, the new Civil Code give the opportunity to the injured person to claim material compensation based on the terms of the damage liability system. In this case the complete terms in connection with the damage liability are applied, the prove of the violation isn't enough, the injured party must prove the damage, the disadvantage and the relation of the cause too^[16].

The main changes in the regulation of the liability insurance

In connection with the financing of the amounts for damages it is necessary to examine the obligatory liability insurance of the healthcare service providers and the main changes in the regulation of the liability insurance contracts of the new Civil Code. In Hungary the Health Act has made the entering to the liability contract obligatory for the healthcare service providers because it has named the enter as a term of the operating permit^[17]. In the beginning, the compulsory professional liability insurance was a legal institution which has given real legal protection, security for patients and providers too, and has worked according to the legislator's will. But the increase of the borders of the liability of the healthcare service providers has disrupted the compatibility between the providers and the insurance companies. Because of the closed character of the supplying part of the healthcare professional liability insurance market, the unilateral contracting obligation for the healthcare service providers, the lack of the regulation on determining minimum conditions of the healthcare liability insurance, the contractual conditions determined by the insurance companies „are vacating” the legal institution. Without real legal protection this legal institution is a fetter for service providers, and the financing of the amounts of the compensation isn't solved yet^[18].

The topic of this paper isn't the examination of the complete regulation of the insurance contracts, so I deal with the special changes on the insurance contracts. The new Code put the insurance contract in the area of the damage caused by incitement contracts. The definition, the main feature of the contract haven't changed, so the topic of the contract is still the compensation of the damage by the insurer, which for the insured party is responsible according to the law. But, corresponds with the judicial practice, the payment obligation of the procedural charges, of the charges for the legal representation and of the interests has been introduced^[19]. In the case of the prior ones, the payment obligation is applied only for charges which have been emerged by the direction of the insurer or emerged earlier, and the insured party can claim advance. In the case of charges for the legal representation the change is favourable for the insured party, because the charges must be financed by the insurer beyond the insurance amount.

The obligation for report the existence of the insurance event has already been in the Code, and the failure of the report has meant the exemption of the insurer, if significant circumstances haven't been able to examine because of the failure. According to the new regulation, in the contract there must be 30 days of term for doing this obligation. The act has made the extent of the reporting obligation clearer, which can make a specific situation in connection with the liability insurance of the healthcare service providers. The insured party must report if there is a claim in connection with the activity in the contract and must report if he gets to know a circumstance which can be a base for such a claim^[20]. So, the healthcare institutions must report every problems, mistakes which can be bases for claims, even in the case of lack of claim for damages. I think that this measure of the reporting obligation is unnecessary, furthermore, in an institution the events which later could be bases for claims can't be checked daily. It isn't expectable that the institution must search for the potential claim for damages in every problematic cases.

The new Civil Code preserves the rules, that the injured party can't enforce his claim direct against the insurer. The reason of this is that the payment obligation depends on the behavior of the insured party. The liability of the insured party must be cleared, sor the procedure won't be faster. But, the neglectable claims against the insured person will increase^[21]. New rule of the Code that it authorizes the injured party to lodge action against the insurer to clear that the liability cover of the insured party existed or didn't exist in the time of the damage. The insurer still must perform to the injured party, except if the insured party has already paid, because in this case he can claim that the insurer performs to him^[22].

It is possible the liability insurers of the healthcare services will apply rarely this new opportunity. According to the Code, the insurer – based on its own decision – can perform to the injured party, if the insured party disputes his liability or the measure of the amount groundlessly. In these cases the insurer usually wants to reduce the amount of the payment or to be released, I don't think that it is possible to pay for the injured party based on its own decision, while the tortfeasor disputes the claim against him.

The rule still exists that if the insured party admits the claim for damages, pays, makes a deal with the injured one, then this action will be effective for the insurer, if it has accepted it previously or accepted it later. The judicial condemnation is also effective for the insurer only, if it has been in the action, has dealt with the representation or it has given up these possibilities^[23] This is the point where there is a completion of the regulation on the liability insurance contract and this is – I think – can cause an very important change in connection with the liability of the healthcare services. According to the new rule, if the claim of the injured party is obviously grounded, in the case of the acceptance by the insured party, in the case of agreement and pay, the insurer can't say that this isn't effective against it. It means that in the cases of obviously grounded claims, the acceptance or the later ratification of the insurer isn't needed for the acceptance, agreement or the pay, independently of these, there will be a payment obligation. These rules can make significant effects on the healthcare liability system. The out of court agreement is more favourable than the legal proceeding. Earlier, the problematic cases have ended often with agreements, and this has changed mainly because of the behavior of the companies ensuring the liability insurances, and because of the lack of the agreements caused by the losses of the business sector. But, if in some cases the insurer won't have a chance to dispute the agreement between the parties, this can cause the growth of the out of court agreements. The most important question is that what is the definition of the obviously grounded claim, and how will it be determined?

In the area of the liability insurance the regulation doesn't say anything on the regressive claim which has existed, and according to it in the cases of the events in the contract based on willful tort or willful negligence, the insurer was able to claim the payed insurance amount from the insured party. But, among the common rules of damage insurances there are the cases of the exemption of the insurer, and this could cause many changes and disputes in the area of the healthcare liability insurance. The insurer is exempted from the payment if it can prove that the damage has caused by the people, acting with willful tort or willful negligence^[24]. In the case of the prior one we can agree with this rule, but in the case of willful

negligence, the cases of the payment obligation of the insurers would be very few, depending on the interpretation of the court. This rule has already existed in the regulation of the regressive claim, but I think that compared to the compensation claim, the exemption from the payment obligation creates a less favourable situation for the hospitals. In the case of the compensation claim, the insurer has paid and after this it has had the possibility to reclaim the pay from the insured party. But, the insurers haven't taken this chance often. In the case of exemption it hadn't to pay in the first place, so during the procedure, the insurer and the insured party could become adverse parties. The interest of the insurer firstly is to prove the willful tort or the willful negligence in the favour of the exemption.

The rule in connection with the multiple insurance in the new Code can make relevant changes, because it gives the chance that the same interest can be insured by many insurers^[25]. The problem is the lack of the possibilities in the Hungarian healthcare liability insurance market, although there is the possibility to enter to the foreign insurance companies.

Summary

Although the new Civil Code has already entered into force, we haven't known yet if the change of the regulation will change and in what way the practice of the liability for damages of the healthcare service providers. The legislator has realized appropriately that the stricter form for the compensation of the damages caused by the breach of the contract, inspired by the business contracts isn't suitable for the liability of the healthcare service providers. With changing Section 244 of the Healthcare Act, the legislator has already referred to the rules on torts which are actionable per se, and doesn't refer to the rules on contractual liability from the Civil Code. It must be mentioned that the prior form of Section 244 of the Healthcare Act has ended discussion between jurisprudence and practice in connection with the qualification of the legal relation between healthcare service provider and the patient in 2010. If we accept the contractual feature of the legal relation, the regulation is logically oppositional, because it orders to apply the rules of the out of contract liability for damages to a contractual relation. It would be better and necessary if the legislator – taking advantage of the private legal codification – had regulated in the Civil Code the legal relation between the healthcare service provider and the patient as a substantive contract, or as a subtype of the contract of services. In this case the special rules of liability would be acceptable too.

The legal institution of the injury fee will make changes in the area of the liability of the healthcare service providers. Because there the objective legal consequences for the violation of the personal rights, and unfortunately the violation of these rights are frequent in connection with healthcare services too, the damage claims are becoming more frequent. The solution depends on the reaction of the judiciary. This legal institution can make positive change for healthcare service providers, according to the judicial practice the amounts can be lower compared with the compensation for non-material damages. The condemnation of the service providers are usually not because of serious infringement or seriously actionable conduct, and during determining the amount of the injury fee these must be taken into consideration.

The rule on liability insurance contract of the Code can make big changes and can help the out-of-court settlements, according to this, the acknowledgement by the insured party of the obviously founded claim from the injured party, the settlement of the mentioned ones enter into force oppose the insurance company, without its consent. The size of changing is influenced considerably by the interpretation of the obviously founded claim. At the same time it is disadvantageous that the insurance company can be excused from the payment in the case of premeditated or seriously negligent tort, instead of regressive claim. This makes the insurance company and the healthcare insurance company to adverse parties, because of the interest of the prior one is the confirmation of the premeditated or seriously negligent tort to be excused. The enlargement of the notification requirement in connection with insurance event is a new element, and making the notification of circumstances - which can make base for damage claim - to be obligatory is a new element too.

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24. 2013. évi V. törvény 6:464. §.
25. 2013. évi V. törvény 6:459. §.
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