

## **Travelling from Heaven to Hell, or the Hungarian health care providers damage compensation responsibility over the past fifteen years**

### **Heaven (1990-1995)**

Hungary in the early 1990s, in accordance with the past forty years' practice there were hardly any compensation procedures against health care providers and the majority of the cases were won by the providers.

The scope of the care providers' compensation liability was very limited and only in a few cases did courts adjudicate liability for actionable conduct or establish a connection between damage and malpractice. According to judicial custom the base of civil liability, similarly to criminal responsibility, is the violation of the occupational regulation. Malpractice resulting in damages was qualified to be diagnostic error and when this was not possible the damage was attributed to risk of intervention. Naturally in such cases the adjudication of compensation liability was out of question. The judicial custom required absolute certainty to establish connection between damage and malpractice, accordingly, even if there was actionable conduct due to the absence of connection no liability compensation was adjudged.

Forensic expert witnessing played a major role during the litigations. Usually the experts were provided by institutions and almost always at the request of the authorities. In addition, often these reports were sweeping generalisations, in fact, the judgements only repeated the statements included in the reports. In other words, the specialists decided on the outcome of the litigations.

The amount of compensation was low. Non-financial compensation was adjudged only in the cases of serious and lasting damages, this kind of compensation was regulated by legislative provisions.

In 1992 at the appearance of the first legal proceedings insurance companies launched their professional liability insurance product for health care providers, which had not been on the market during the previous forty years. Insurance companies provided liability up to 5 million Ft (20.000 Euro) for care providers. This amount was enough for the compensations adjudged or in unambiguous cases for paying for the out-of-court agreements.

### **Journey (1996-2002)**

Lawyers set up specialized offices for compensation cases and for suing health care providers. The Offices filed litigations in great numbers, employing private expert witnesses who helped to decide on whether it was worth taking legal action and supported lawyers during the litigation. On the care provider's side no special legal representation and expert background had developed. Accordingly, the increased number of legal proceedings started to change the judicial practice. Type cases appeared and several generalised resolutions were passed in the judicial custom.

Regarding the risk of intervention the court stated that there is difference between legal and medical approach and if something is not considered a risk according to legal interpretation it cannot be regarded a risk in a medical interpretation either. In other words, the court defined the notion of risk in a narrower context than forensic expert witnesses. As for diagnostic errors the practice argued that committing an error is accepted yet only if all the necessary and justified examinations are performed in order to avoid malpractice, that is, the situation has the potential for a diagnostic error to occur. If the necessary examinations were not carried out and someone committed an error, he could not be relieved on account of making a diagnostic error.

The expected attitude of care providers differed according to the criminal and civil law. The latter expected due diligence from the providers, the greatest diligence, which was wider in scope than the violation of the occupational law drawn up in the civil law. Provision of

incomplete appeared as a basis of suing the providers. The providers were responsible for informing the patients and they also had to attest to have brought the patient and his relatives in a position to make an informed decision. When this was not the case incomplete provision was enough the adjudge damage compensation.

Forensic expert witnessing was not only institutional, more and more specialists registered themselves on the expert list beside their clinical qualifications. This meant that in the process of expert witnessing a clinical approach became dominant. Experts appeared in fields such as microbiology and intensive childcare for which there had been no precedent earlier. The reports of private experts requested by the parties began to be accepted by the court, in number of cases they were treated equally to specialists' reports provided by the court. That is, the court started to weigh the reports of both private and institutional experts.

The amount of compensation increased since compensation rose in other fields of personal injuries as well and this had an effect on legal procedures against health care providers. The strict stipulations for adjudicating non-financial compensation were repealed by the Constitutional Court.

Liability insurance companies still committed to paying 5.000.000 Ft. Due to the great number of proceedings initially the amount of agreements had increased, yet the large number of damage compensations resulted in the restriction of the services provided by the insurance companies. The conditions were regulated containing more and more excluding stipulations, deductible from the providers' part was introduced and the duration of commitment was reduced. In the beginning the insurance companies tried to support the legal representatives with special experts but this gradually disappeared and their role narrowed down to paying compensations. However, the 5.000.000 Ft often did not cover damage compensations and the increasing difference had to be paid by the providers.

Hell (2003-?)

Health care providers did not react appropriately to the aforementioned changes. Their representatives still emphasised the poverty of health care and the greediness of lawyers instead of recognising the problem and acting against it.

More and more general resolutions were passed in the judicial practice, which practically made the care providers' responsibility objective. The statements of reasons included a liability of a broader scope, by interpreting the European professional liability; this ceased the exceptional position of the providers. Furthermore, care providers had been brought under consumer protection law, that is, they became true providers.

According to the judicial practice providers have to attest that even in the case of due diligence the patient did not have any chance of recovery or survival. If the provider cannot attest this or the slightest possibility of recovery or survival arises, the provider's liability is adjudged. The aforementioned attestation causes a lot of difficulties to the providers.

Even the probability of a connection between the actionable conduct and the resulting damage is sufficient to adjudge responsibility, in other words, absolute certainty is not required. In the past the uncertainty resulted in not having a causal relationship, which was advantageous for the provider but today uncertainty means probability which results in a causal relationship.

In theory it is the provider who chooses the medical treatment to be carried out but in case he has more than one option, subsequently the liability is his. This restricts the liberty of medical treatment considerably.

Provision obligation remains since the law ordains full information provision, which is not restricted by judicial practice either. Thus, it is rather difficult for the provider to attest that he has brought the patient in a position to make an informed choice since it is fairly easy to refer

to the fact that the information has not been full. The provision continues to be oral in the majority of the cases, which encumbers the attestation procedure of the providers.

Institutional specialists are supplanted from forensic expert witnessing. The expert reports are very often only used as auxiliary materials by the courts, most of the time adjudications are based on judicial practice rather than on experts' reports, in fact, they often differ from the specialist's report.

Compensations, in particular non-financial compensation, are increasing due to the rise of the standard of living and the higher EU compensation amounts. The scope of the relatives entitled to compensation broadens to spouses and grandparents next to husbands, wives, parents and children.

The conditions of the insurance companies get more and more restricted, e.g. the number of exclusions is increased (one insurance company identified thirty exclusions), the amount of deductible is also raised. Some insurance companies completely leave this field of activity. The limit of commitment remained 5.000.000 Ft in the case of patients confined to bed and in dangerous professions, as for less dangerous professions the amount has increased to 10.000.000 Ft (40.000 Euro). Insurances cover only the 20-50% of the compensation, the rest is paid by the providers. The number of arrangements is minimal. None of the insurance companies provide special experts or legal support any longer. It can be said that at the present time professional liability practically does not function in Hungary.

#### Future (?)

The future would mean the effective treatment of the aforementioned issues by the care providers. Although these problems cannot be changed, further disadvantageous changes could be prevented and the current liability limits could be restricted. Nevertheless, this should be initiated and carried out by the providers. It is still a question when this process is going to start, however, the later it begins, the less chances it has to provide substantive help.

It is necessary to create a great number of professional protocols in order to establish what due diligence means in the case of certain interventions. Such protocols have been already formed partly but they hardly cover the clinical field and they are not detailed enough to provide substantive help. Having established these protocols the provider should get acquainted with them and apply them and create institutional protocols accordingly, moreover, these protocols should be used for reference during compensation litigations.

Documents have to be drafted which provide detailed written information regarding a great number of interventions. These should not be drawn up by the institutions but rather by professional councils or financiers and at the same time it would be indispensable that institutions use them. In such way information provision would be in writing, which could help providers in the attestation procedure.

It is crucially important that health care communication change. Institutions have to learn to treat patients as equal partners and they must learn how to handle a compensation request if it arises out of court. They should provide substantive examination and detailed answers. In addition, they have to learn how to act in court and in the mass media.

Another very important change would be the reform of professional compensation liability. On account of the absence of competition a legislative provision is indispensable concerning the minimum conditions of the above mentioned notion. This would have to ordain the amount of insurance commitments and the exclusions an insurance company could apply. If it does not function on business grounds, a non-profit insurance company has to be set up, specialised in health care professional liability. Such a company would need to employ appropriate legal and expert assistance.

We have been missing the aforementioned changes for years but so far nothing has happened. It is a question what health care wants, to continue its journey to Hell blocking the way back,

or to let itself be pushed further to the adverse direction or to try to turn back. I do not think Hungarian health care would like its care providers to have the broadest compensation liability. The decision is in the hands of Health Care, it is a question if it wants to take it or not.

#### Heaven (1990-1995)

There are hardly any compensation procedures, most of them won by care providers. Judicial practice: the risk of intervention, broad interpretation of diagnostic errors, causal relation only in the case of absolute certainty, expected conduct= violation of the occupational provisions  
Low compensations, non-financial compensation only under certain conditions  
Dominant forensic expert witnessing  
Initially efficient liability insurance

#### Journey (1996-2002)

Changes in the judicial practice: the legal and medical interpretation of risk, the scope of diagnostic errors narrows down, obligation and responsibility of full information, expected conduct=more than violation of the occupational provisions  
The number of institutional experts decrease, specialists from the clinical profession, private experts between the two parties. The court chooses from different reports  
Compensations increase, the strict stipulations of non-financial compensations are repealed  
Insurance companies commit to paying only up to 5.000.000 Ft (20.000 Euro). Conditions are stricter; compensation is paid by care provider beside the insurance companies.

#### Hell (2003-?)

Judicial practice: liability is adjudged if recovery or survival is feasible, providers have to attest the absence of probability, restriction of the liberty of health care, obligation of full information.  
The role of forensic expert becomes subordinate, sometimes judges adjudge upon judicial practice than upon the expert's report  
Compensations increase: the standard of living raises, European effect  
Liability conditions are further restricted, insurance companies only cover the 20-50% of the compensation

#### Future(?)

Creating professional protocols, applying them  
Informational documents, written form  
Communication with the patient and the damaged in court, in the mass media  
Shaping the professional liability insurance: provisions on the minimum conditions, a non-profit insurance company

Decision is that of the health care's. We wonder how adverse the situation has to be to take these decisions.