

The courts' case-law on the reduction of the chance of recovery

The issue of the reduction (loss) of the chance of recovery (survival) has been increasingly addressed by the courts' jurisprudence throughout the world in connection with legal actions for the compensation of material and non-material damage caused by healthcare providers. Such actions are primarily based on an illness-stricken or injured person's deterioration of health incurred during or immediately after the provision of healthcare services possibly as a result of a healthcare worker's unlawful and wrongful conduct with a causal link uncertain both as to its existence and extent: the victim's deterioration of health in the form and to the extent given may (have) occur(ed) as a result of his initial adverse health condition itself and despite an appropriately careful medical treatment. The judicial assessment of such actions is difficult because the mere possibility of causing damage cannot be fit into the doctrine of natural causation of the tort law liability regime in the field of civil law.

The aforementioned issue has been dealt with by different judicial methods in the various European countries. The approach of the House of Lords (and the Supreme Court of the United Kingdom as of 2009) is based on the traditional rule of evidence (balance of probabilities) and the United Kingdom's supreme judicial forum tends to grant the injured persons' claims in medical malpractice cases only if the individually proven probability of the causal connection exceeds 50 percent. The German Federal Court of Justice (*Bundesgerichtshof*) makes a distinction between serious mistreatment (*grober Behandlungsfehler*) or gross breach of duty (*grober Pflichtverstoß*) and the "minor" breach of professional rules as a result of negligence (*Flüchtigkeitsfehler*), although the criteria of differentiation are not clearly indicated. If the healthcare provider's serious misconduct is generally (theoretically) capable of inducing adverse health effects, then the existence of the link of causation is presumed in individual cases as well, which practically means that healthcare providers become presumed liable in matters related to the reduction of the chance of recovery. According to the case-law of the French Supreme Court (*Cour de Cassation*), the tortfeasor's liability is adjusted to the probability of the patient's foiled recovery, and the extent of such liability is calculated on the basis of the value of the chance of recovery by taking the relationship between the value of the loss of advantage and the probability of the occurrence thereof into due account (*perte d'une chance de guérison ou de survie*).

The Hungarian courts' practice has significantly changed on several occasions over the past 20 years in this field. By virtue of the currently dominant judicial approach, also confirmed by the individual decisions of the Supreme Court and the Curia, the plaintiff needs only to prove that the harmful event occurred during a medical treatment provided by the defendant, while, in order to escape liability, the defendant has to prove that the patient could not have obtained a more favourable health condition even in case of the exercise of due diligence by the defendant. The Hungarian courts' case-law has transferred the issue of the chance of recovery from the field of causation to the field of liability. Over the past decade, some regional appellate courts (the ones of Pécs and Szeged) have developed a different practice which is based on the followings: if there is no relevant causal link between the patient's deterioration of health and the medical malpractice concerned, then the harm incurred cannot be compensated by way of damages, the legal basis of such compensation may only be the reduction of the chance of recovery, and the injured party may be entitled only to proportionate damages – the level of which is lower than in the case of liability for result – which may not cover material damage related to the deterioration of health.

The jurisprudence-analysing working group is entrusted with the tasks of exploring and examining the courts' relevant case-law and informing the Civil Department of the Curia about the results of its findings.

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