

Cases at the Hungarian Curia

Round-table discussion

Part I.

II. Dangerous red sludge

Dr. Pál Solt

This is the second case in our first round-table discussion of cases at the Curia. I would like to welcome our guests: Dr. Péter Ákos Bod, economist, university professor, Dr. Attila Menyhárd, professor at ELTE University, Faculty of Law, and Erika Pálmai, journalist working for business weekly HVG. It is well-known that one of the biggest industrial disasters in Hungary, which also had some serious environmental consequences, happened on 4th October 2010, when the sludge-storing section of the dam belonging to MAL Zrt. burst. As a result, 1071 hectares of agricultural land were swamped by a mixture of red sludge and alkaline water. Kolontár, Devecser and low-lying areas in Somlóvásárhely were flooded through the Torna creek. 10 people died in the disaster, nearly 300 people were injured, 120 people were hospitalised, 300 residential and other properties were damaged in the flood. In the case adjudged by the Curia the two claimants sought compensation for pecuniary and non-pecuniary damage from MAL Zrt. The Curia, in its decision to be discussed now, was of the same opinion with the first and second instance courts, which held that the company was liable for the damage caused. The case, however, goes far beyond the case of two injured parties, since several lawsuits have been started. The first question goes to Péter Ákos Bod: What economic issues were raised in relation to the case?

Dr. Péter Ákos Bod

As you mentioned in the introduction, this was an extraordinary event. A real industrial disaster, one of the toughest and most severe in Hungary and what we are talking about now is only a small slice of it. The case adjudged by the Curia was in fact an action for damages, but there are many other parties concerned. Apart from the two claimants whose case we are discussing now, hundreds of people were involved and affected. The fine imposed by the green authority was perhaps around 135 billion Hungarian forints, the fine for water pollution was also around a billion. In our present case the two claimants hope to win compensation for their loss and the courts must decide who is liable for the damage. We must quickly add two things: the company's total assets add up to only a small fraction of the damage caused. Later on we can come back to this issue. It is unfortunate that in our modern economy a business can cause such serious, unforeseen damage. Let me mention that the plant in Ajka, which was set up in 1942, is not even on the list of dangerous industrial plants, and the red sludge it held is not among those materials listed as hazardous waste. This issue is obviously irrelevant - and Attila will talk about this later – for those who suffered the damage and wish to win compensation, but still it might be interesting later, when the question of liability must be decided. There are many pending cases, including criminal proceedings, and they are all part of the larger case.

Dr. Pál Solt

I couldn't agree more. In our case, the defendant company alleged that their activity could not be considered hazardous and the red sludge itself was not hazardous waste. Thus, the Curia had to review a judgment brought in civil proceedings. How did the Curia decide? Can the law cope with such problems, do you think? I would like to ask Attila Menyhárd now.

Dr. Attila Menyhárd

The judgment itself is clear, all three courts decided univocally, the legal interpretation of facts was the same. The courts – without determining the amount of damages to be paid – found the defendant liable. In fact the court's decision fits into judicial practice, yet it still has a message. Whether civil liability is suited for solving such situations is another question. The facts of the case seem pretty simple, and the court found the company liable. If someone performs a business activity with an increased risk and causes damage to someone else, they shall be obliged to pay compensation for the damage caused and shall only be exempted from liability if they can prove that the damage had been caused by unavoidable circumstances that fell outside their business activity, outside their scope of operation. This was in fact the court's starting point. First, the court had to decide whether the activity can be considered an increasingly risky activity, which is an independent concept in civil law, so in this respect it was quite irrelevant how the substance that caused the damage was classified by public law, environmental or other legislation. As the facts of the case show, it was an activity that could potentially cause damage to many people, since a lot of people died, and damage to property was also quite serious. The court examined in detail the defendant's compliance with environmental regulations, but this was in fact not really necessary, since the company's activity qualified as high-risk activity anyway. From this point, the defendant's liability could only have been waived if they had been able to prove that the damage was caused by unavoidable circumstances, and fell outside their scope of activity.

Dr. Pál Solt

This is a difficult question for the layman, because the term *unavoidable external circumstances*, or *force majeure* as it is often called, is well-known to many people, without them really understanding it. The defendant claimed that there was a lot of rainfall, and this was an external cause.

Dr. Attila Menyhárd

In fact, the defendant pleaded two main lines. On one hand, they argued that they did everything they could, as required by the law. Nobody objected to this practice. On the other hand they argued that it was due to the weather. But as the courts have pointed out, the reservoir was open and exposed to weather conditions, so weather could not be considered as a cause outside the activity.

Therefore, it was not really necessary to examine whether the damage could have been averted. The fact that the defendant's procedure met the requirements of public law is not

necessarily relevant in terms of civil liability. For instance, if you apply for a building permit and that permit is granted by the authority, it does not entitle you to cause harm to your neighbour by robbing them of their view. The same prevails here as well.

Erika Pálmai

As a layman let me ask a question: Can liability be passed on to someone else? After all, the defendant had a valid operating permit, and their procedure for storing red sludge was checked and supervised by the environmental authority. So the defendant abided by the rules set by the government and did not want to cause damage, obviously they did not want the dam to burst. In this case, can liability be passed on?

Dr. Attila Menyhárd

Yes. The first question is whether the defendant abided by the rules. The liability rule that we were talking about is quite interesting, it is not about the injurious behaviour but about transferring risk onto another person. If someone can potentially cause major damage, they will be aware of this, apart from the exception we mentioned before. Liability can be passed on only if there are some persons whose activity or behaviour can be blamed for the damage.

Dr. Pál Solt

There is no doubt that theoretically it is possible to find the authority liable for the damage caused. In the present case, I would not go into this more deeply because it is a very different area. I'd rather come back to a point we already mentioned, the issue which had earlier been raised by Péter Ákos Bod, that the company's ability to compensate for damage is far less than its ability to cause damage, so we can be absolutely certain that full compensation cannot be recovered from the company's own resources. I think this is irrelevant when deciding about civil liability, but my question is how can the law handle such damage?

Dr. Attila Menyhárd

The law must establish rules for bearing risk and liability for damage caused in society, and there are various alternatives. One is civil liability, but it is not the only one. The main rule, in fact, is that damage must have been sustained by the injured party unless someone else shall be liable in accordance with another rule. One such exception is when the person who has been found liable shall pay for the damage. There are industrial disasters everywhere in the world, not just in our country. I think there was a disaster back in 2001 in Toulouse, France which made people think about this issue and what the law could do to solve it. The liability rule does not seem to work in this respect because it is quite limited and it depends on the defendant's ability to pay, regardless of whether the defendant is a natural person or a company, regardless of the size of that company. An alternative solution for transferring risk could be insurance.

In addition to insurance, the state might compensate certain people for their loss, to a certain extent, and in fact this happened in our case as well. Compensation is usually one

of two kinds: temporary or permanent. The state may separate some funds from the budget in order to pay damages to some victims of a given disaster. The question is how risk is eventually shared. If the defendant is declared insolvent and the company is unable to pay compensation to the victims, the injured parties will have to bear the risk. If compensation is paid from the state budget, the risk will be borne by society, and all society will take a share. If there is insurance, the risk community will be liable. Probably this would be an ideal solution.

Dr. Pál Solt

Obviously these opportunities exist. However, as a judge, I also believe that when a court delivers a judgment in a compensation case where private individuals have caused harm to each other, there is always a risk that the injured party will not get their money even if a court awarded them damages.

Dr. Attila Menyhárd

This is possible. This raises the question then: what can the law offer

Erika Pálmai

I would have liked to ask if then, if not... This is still the kind of acceptable, sufficient solution which the law could provide in this situation? Because the topic we touched on arouses doubts and uncertainties in the rest of society.

Dr. Attila Menyhárd

The law can provide justice because it can determine liability, but it cannot provide money. Resources are quite limited in society, and limited resources should be allocated. Money is also a limited resource. Compensation must be paid by someone, either by the injured person, a risk community, society as a whole, or the person that caused damage, if able to pay.

Dr. Péter Ákos Bod

Currently, the situation is that after liquidation proceedings were started against the company, the claim for damages, which used to be a disputed claim, now has become an uncontested claim, and got into line behind other claims of hundreds of billions in assets. This is probably very bad news for those who were hoping for some financial compensation. It shows that in case of an industrial disaster, we cannot ignore the state budget. Insurance would be an ideal solution if this was a recurring case and insurers could make an offer, collect premiums, just as for medical insurance.

I'm not familiar with today's industrial practices but I think it would be extremely difficult to get any insurance. A case like this can impoverish a big section of the community. So the state cannot be bypassed, especially in our society.

Dr. Attila Menyhárd

I can recall some cases from American case law, when for instance in the Contergan case American pharmaceutical companies were sued in the 1970s and a huge amount of compensatory damages were awarded by the court. It was totally appropriate and fair both socially and legally, but the drug company went bankrupt, which affected the structure of that market and later on this company was not able to continue to produce any other drugs.

In the same way, Enron went bankrupt in America not so long ago. The company caused damage to many people but at the same time it was a major employer and market player. When they were pushed out of the market, they were lost. As a result an audit company, Arthur Andersen, also went bankrupt. Until that time there had been the Big Five, and suddenly this changed into the Big Four; so the structure of the auditing market has also changed, which might turn out to have long-term social effects.

Erika Pálmai

The problem was that nobody could act in lieu of the MAL, so people not only suffered harm by being sludge-flooded but also the financial consequences of losing their jobs since the biggest employer in the area ceased trading, and there was a lack of money. They got neither compensation nor wages...

Dr. Attila Menyhárd

That's right. Civil law regulates the relation of two parties: A causes damage to B, B suffers damage. Certainly this may have social consequences as well. Fortunately, in Hungary we didn't have to get used to natural disasters, apart from some occasional hail. So there are no earthquakes, no tsunamis. Recently society and the economy has had to face industrial disasters however.

Dr. Pál Solt

The law can surely give answers within its own framework. But is it reasonable to conclude that the state must or should intervene? It is only the state that is strong enough to do so. The financial power of the state comes from our money, if I can say this as a layman. This might be considered as a reflection of social solidarity, but if taxpayers' money is spent to help the victims of the red sludge disaster, this cannot be considered as an expression of social solidarity, despite the fact that not all members of society need to give their consent personally.

Dr. Péter Ákos Bod

I think there is no other solution really. Of course there are some arguments against it, for instance even people who have nothing to do with the disaster are made to pay, since they all live here and must share the burden of those miserable victims who got flooded while asleep or at lunch. The real con is rather the moral risk taken by the state. If the state helps out those who caused damage, will decision-makers become less responsible and take greater risks?

Now in the present case there is no need to talk about this because criminal responsibility

has not been decided yet, and besides that it's an old case. Well, it was revealed that the reservoir had been installed in the wrong place. Then it had been filled for 12 years before the disaster happened. What we're talking about here might sound rather abstract for those who have not received compensation to cover their claims.

Dr. Attila Menyhárd

I think the existence of such a state compensation scheme or decision does not necessarily mean that some decision-makers become irresponsible. We can imagine a system where – depending on the load capacity – everyone gets something, but not the full amount of course.

Erika Pálmai

And how does jurisdiction play a role here? This particular procedure?

Dr. Attila Menyhárd

In this system....

Erika Pálmai

The state proclaims to its citizens that this situation has been solved. There was a very clear, very logical decision, which stated liability, and it fitted the public mood perfectly. Still, we are now saying that the state must stand for those liable, because of the circumstances.

Dr. Attila Menyhárd

In this respect, I think we are not completely accurate, it's because of the solidarity which Mr. President mentioned before... In addition, everyone is a potential victim in this respect. So if someone has not been affected, that does not necessarily mean that they could not be harmed by something completely different. So the question is not whether the state should step in as a legal person, but whether risk should be shared by the community as a whole. It's not about transferring risks but rather about spreading or sharing them.

Dr. Pál Solt

As the old saying goes: "*we are the state*".

Dr. Attila Menyhárd

Yes, indeed.

Dr. Pál Solt

You could say that. It's interesting that we've been discussing the Curia's decision brought in a civil case, but we have gone far beyond that. Erika Pálmai mentioned that this decision corresponds to people's sense of justice, and this is a good feeling, which comes quite rarely. However, images of the Kolontár family having lunch peacefully and the red sludge

are very different, so it's quite clear which side we should stand on. The role played by the victim, which must always be examined, is not considered now. It is only the tortfeasor, the person that caused damage, compared to society as a whole...

I think as a journalist you can also see that society took a really positive attitude and wanted to help the victims.

Erika Pálmai

Definitely. The entire system of assistance has been transformed. Incredible amounts were moving, there were amazing collaborations. So I think social solidarity was already tested in the days following the disaster, and it will be tested again later...

Dr. Pál Solt

I think we can conclude that social solidarity has been manifested in the immediate assistance given to the victims, in offers given by individuals and institutions, and at a higher, more abstract level by the state budget. Civil law can take us a long way.

Dr. Attila Menyhárd

It is obviously a very sensitive issue that a court must decide in a compensation lawsuit/tort case of this kind, because there are the rules of civil law, which are usually quite abstract, flexible and open so that the court can reach an appropriate decision for spreading losses. The law basically – just to return to Erika's question shortly – can manage a social conflict, but it cannot provide money.

We often expect the court and the law to solve problems, but the law cannot fix things. The law cannot build up...

Erika Pálmai

In the meantime the law is proclaimed to offer a solution. I think it can help to give relief. Its significance starts as soon as it is enforceable.

Dr. Pál Solt

We can say that the power of a court judgment is shown in its ability to be enforced. However, in some cases this cannot be guaranteed... The law provides justice, said Professor Menyhárd. It will tell you who is liable, and how much that person must pay to the other. This is where the court's power ends.

Well, I think we could talk about this issue a lot more. I would like to thank you all for participating in the discussion, and now we say goodbye to our viewers and hope that the Curia Cases Round-table discussions will continue.