XIV. Hungary

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There are some clear trends that underlie the development of Hungarian tort law in the past 25 years, with the issues relating to areas such as assessing uncertainties, compensation for personal injury, medical malpractice, protection of inherent rights of persons and constitutional rights, and State liability. As to State liability, there was no landmark case due to the contradictory tendencies that still make court practice rather confusing and unsatisfactory. In general, there has been an expansion in tort law, marked by a widening of the scope of potential plaintiffs, such as relatives who may claim damages for personal injury or health damage of a member of their family, increasing amounts of non-pecuniary damages and strict standards in medical malpractice cases, also supported by a reversal of the burden of proof.

1. Supreme Court, Legf Bír Pfv III 22.188/2010, BH 2012 no 10[1]

This case addresses the issue of reversing the burden of proof of the causal link in the case of lack of information. While the plaintiff's mother was being transported in an ambulance, she suffered a cardiac arrest and was successfully resuscitated by the attending paramedic physician. Upon arrival at the hospital, the admitting physician reviewed the portable electrocardiogram (ECG) and, without performing further life-saving interventions, pronounced the patient dead. Despite a subsequent control ECG indicating ventricular tremors, the absence of functional cardiac activity led to a final confirmation of death without admission to a clinical ward. The Supreme Court determined that while the cessation of cardiac function may indicate clinical death, such a state does not preclude the possibility of resuscitation. The hospital staff failed to provide medical treatment or initiate resuscitation protocols, instead prematurely declaring death. The Court reasoned that the patient was in a terminal state rather than a state of irrevocable death. Consequently, the defendant's

[1] See also *A Menyhárd*, Hungary, in: K Oliphant/BC Steininger (eds), European Tort Law 2012 (2013) 333, nos 8–13.

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omission constituted a breach of duty. While the success of a hypothetical resuscitation remains speculative, the failure to attempt it deprived the patient of a chance of survival, constituting actionable harm. In litigation relating to the loss of a chance, the requisite causal nexus is established between the professional negligence and the deprivation of the opportunity to survive, rather than the death itself. The burden of proof shifts to the defendant to demonstrate that the fatality was inevitable notwithstanding immediate intervention. Furthermore, the Court affirmed that the absence of contemporaneous medical documentation cannot be replaced by testimonial evidence.

The case did not address the question of assessing probabilities but rather the issue of assessing uncertainty. The case has been reported as a typical case of loss of a chance in medical malpractice, but neither inherent uncertainties were involved nor probabilities considered. Thus, the court actually simply reversed the burden of proof of causation instead of applying the doctrine of loss of a chance. One of the possible solutions for assessing uncertainty in causation is the doctrine of loss of a chance. Although such a doctrine is generally rejected by Hungarian courts,[2] it has been accepted in medical malpractice cases.[3] The judgment refers to this doctrine, presumably in order to justify the conclusion of the court by anchoring the judgment in settled court practice. But the court in this case did not assess loss of a chance but reversed the burden of proof for causation. Although loss of a chance is an issue also discussed in Hungarian legal professional literature, the courts have solved the problem so far by establishing partial causation and partial liability. The reversed burden of proof for causation was a new approach, which is established and presented clearly in this judgment. The *ratio decidendi* that decreasing the chance of recovery can lead to the establishment of a causal link is misleading as, in this context, this decision did not concern the loss of a chance but rather proof of the absence of a causal link. In another judgment concerning the liability of a motorway operator for damage that was caused by game gaining access to the road,[4] the Supreme Court required the operator to prove either that the fence was not defective at the time of the accident at all or that, notwithstanding the defect in the fence, game could not get onto the highway in order to be relieved of liability. In this case, reversing the burden of proof of causation was also a tool to allocate the risk of lack of information.

[2] Supreme Court, Legf Bír Pfv 21.129/2009 BH 2009 no 356.
[3] Supreme Court, Kúria Pfv III. 21.056/2020/9 BH 2021 no 307.
[4] Supreme Court, Legf Bír Pfv III. 21.682/2008 BH 2010 no 7.

The current judgment also confirmed that hospitals bear the risk of a lack of documentation or if the documentation of treatment is incomplete. This is also a tool to assess uncertainty because the risk of absence of information is shifted to the defendant. This judgment was also the reference point for the rules on necessity of evidence (*Beweisnotstand*) introduced in civil procedural rules in 2016. According to § 265 subpara (3) of the Civil Procedure Act,[5] in a privileged case of inability to prove, the fact to be proved by the party concerned may be accepted by the court as the truth if it does not have any doubt regarding its veracity. This also shows that uncertainty may be assessed via procedural rules like evidence, burden of proof as well as by substantive law doctrines such as loss of a chance or awarding general damages. With such rules, the Civil Procedure Act provides a procedural solution to the same problem that was solved in material law with reversing the burden of proof of causation in court practice. This solution highlights that the problem of probabilities can be assessed both on a procedural and on a substantial level. At this point, procedural and substantive law cannot be functionally distinguished.

2. Constitutional Court, Resolution no 28 of 2014 (IX 29)[6]

The right of policemen to their image was the focus of this case. From the beginning of the 2000s, there was an emerging trend in Hungarian court practice that publishing the image of a policeman in service is to be deemed as an unlawful interference with the policeman's inherent rights, that is, the right to one's own image. This was how the courts responded to the challenge that they faced as a result of policemen often being exposed to insults and harassment after having been identified on the basis of press reports which included their photo. The courts approached the issue from the angle of whether the doctrine of the lower level of protection provided to public figures should be applied to policemen and other officers, like guards of arrested people escorting them to a court hearing. The Supreme Court concluded that policemen and other officers do not qualify as public figures so they are to be protected just like ordinary people. The Supreme Court confirmed this practice in its Resolution no 1 of 2012 BKMPJE, by stating that persons performing official duties or working in a public place or public space are not considered to be public

[5] Act no CXXX of 2016 on the Code of Civil Procedure.

[6] See also *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 249, nos 2–4.

figures in the course of their activities, therefore their consent is required for the publication of an image or sound recording that identifies them in an identifiable manner.[7] This court practice has been challenged by the press continuously. They argue that this court practice undermines freedom of speech and also the public control of the central power.

In the case at hand, the Regional Court of Budapest, in line with the practice settled by the Supreme Court, initially awarded non-pecuniary damages to a police officer whose image was published by an internet media service provider without authorisation during the reporting of a public demonstration. The media service provider challenged this ruling, asserting that the prevailing judicial practice – which held that police officers do not qualify as public figures – violated the fundamental rights to freedom of expression and freedom of the press as enshrined in the Fundamental Laws of Hungary. Upon review, the Constitutional Court repealed the lower court's judgment. The Court determined that the publication of a recognisable image of a police officer acting in an official capacity necessitates a proportionality assessment between competing constitutional values: the individual's right to their image (personality rights) and the public's right to be informed.

The Court established that there is a presumption of disclosure, that is, in the context of public interest vested in reporting on contemporary events, priority should generally be given to freedom of speech and freedom of the press. This freedom, however, is limited by the right to human dignity of the involved person. Thus, the publication is held unlawful only if it infringes upon the subject's human dignity (eg, an image depicting a wounded officer). Provided human dignity is respected, the lack of explicit consent does not, per se, render the publication of an officer in action unlawful.

The Constitutional Court concluded that freedom of speech and freedom of the press are to protect the possibility of discussing public affairs without limits, which raises the question of what the informative function of the press encompasses in order to ensure the free discussion of public affairs. It found that the right to freedom of the press is a fundamental right enshrined in the Fundamental Law and of particular importance in a democratic system. In contrast, the subjective right to protect the external manifestation of human personality, the image used to identify a person, is not an independent fundamental right: it should receive constitutional protection through the protection of human dignity and may serve to restrict other fundamental rights. The Constitutional Court

[7] <https://kuria-birosag.hu/hu/joghat/12012-szamu-bkmpje-hatarozat>.

also considered the extent to which the right to freedom of the press may be constitutionally restricted with regard to the protection of the image of persons exercising public authority. The Constitutional Court, in this context, distinguished between public figures and persons exercising public authority. According to the Constitutional Court's resolution, the activities of persons exercising public authority and the images identifying them in connection with those activities constitute information only in the context of public events ('the completeness of reporting on current events'). In such cases, the freedom of the press must also be weighed in contrast to the protection of the human dignity of persons exercising public authority. The Constitutional Court also made it clear that the use of images cannot be an end in itself, but must be related to the discussion of the public event. The shift in Hungarian court practice highlights a critical transition from a formalist application of personality rights to a value-based approach. It underscores that the right to one's image is not an absolute barrier to freedom of the press, but rather a protection meant to safeguard human dignity.

The challenge for the Supreme Court is not only to find a proper balance in the light of the opinion of the Constitutional Court but also the fact that one's image can be considered as personal data, which is also covered by data protection legislation. At the very heart of the problem lies the fact that the right to one's image is protected as a specific right inherent to persons and not as an element of one's right to privacy. This could lead courts to providing protection against the publication of an image, even if it did not result in a violation of human dignity nor had anything to do with providing protection against the commercial exploitation of attributes of an individual's personality. This development in Hungarian court practice highlights the consequences and pitfalls of applying written law without having regard to the fundamental values that are to be protected by personality rights, that is, protecting human dignity and liberty of commercial exploitation.

Under art 28 of the Fundamental Laws, ordinary courts are now required to interpret the Civil Code in light of constitutional goals, with the result that judges can no longer rely solely on a literal reading of the Civil Code (which requires consent for photos to be published). They must perform a balancing test between the individual's right to image/privacy on the hand and the public's right to be informed about the exercise of State power on the other. Initially, the *Curia* (Supreme Court) was hesitant to follow this lead. In a subsequent 2015 case, the *Curia* tried to maintain its old practice by arguing that the 28/2014 decision was only applicable to that specific case. However, the Constitutional Court issued further

rulings (eg, 1/2015 (I. 16.) AB) reinforcing its stance. Today, the practice is unified: identifiable photos of police officers in public service are permissible as long as the depiction is not 'self-serving' or 'malicious'.[8]

3. Supreme Court, August 2020, Kúria Pfv IV 21.556/2019, BH 2020 no 238[9]

The case is the most important case on segregation. Between 2003 and 2013, systematic unlawful ethnic segregation was established and maintained at the elementary school in Gyöngyöspata, a small town in Hungary. Defendant 1 (the local municipality operating the school) maintained the institution until 2012, at which point defendant 3 (the central authority) assumed operational control. Defendant 2 (the school) was actually committing the segregation. The plaintiffs, pupils belonging to the Roma minority, were systematically enrolled in 'B' classes, resulting in physical separation from the general student body and the provision of an inferior standard of education. This infringement of inherent rights was established as a matter of law in a prior *actio popularis* proceeding.

In the subsequent judicial proceedings initiated for awarding non-pecuniary damages, the court of second instance modified the first instance award, increasing the quantum of non-pecuniary damages (*solatium doloris*) from HUF 400,000 to HUF 500,000 per academic year per plaintiff. The total aggregate amount of compensation was approximately HUF 100,000,000. The court rejected the defendants' motion for reparation in kind (specifically, the provision of supplementary education). The court held as a matter of law that non-pecuniary losses – specifically feelings of humiliation and frustration arising from a violation of inherent rights – are conceptually incapable of being remedied via restitution in kind.

In response to the judgment, the legislator enacted an amendment to sec 59(4) of Act CXC of 2011 on National Public Education. This provision mandates that where an educational institution unlawfully interferes with a student's inherent rights, the court shall award compensation in the form of educational services rather than paying non-pecuniary damages. This amendment resulted in a significant systemic inconsistency within the civil law regime, because it had never been assumed that non-pecuniary damages should be provided in kind and as previously determined by

[8] *Menyhárd*, ETL 2014 (fn 6) no 4.

[9] *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), European Tort Law 2020 (2021) 278, nos 22–36.

the judiciary, educational services cannot conceptually offset the psychological injury of discrimination. This *ad hoc* legislation, designed to circumvent a specific judicial award, raises fundamental concerns regarding the principle of separation of powers and the stability of the legal system.

The judgment and its consequences had a socio-economic impact and consequences as regards the limits of private law. The enforcement of the judgment reveals the 'vicious circle' of institutional liability. The withdrawal of financial resources from underfinanced municipalities to satisfy damages awards increases the probability of further systemic failures, mirroring the 'malpractice crisis' in the healthcare sector. Furthermore, the case demonstrates the limits of private law in achieving broad socio-political objectives. While the judgment terminated the formal segregation, it led to children belonging to non-Roma families leaving the school, which reduced the number of the students by 50% and resulted in a de facto segregated institution. With the judgment, the courts actually assigned the social costs of anti-discrimination measures to the school: a cost the institution was unable to bear. This may lead to potential insolvency and the eventual cessation of services, which ultimately harms the protected class. Private law, modelled on horizontal relationships between equals, is an insufficient instrument to address vertical, systemic social exclusion.

It seems that it is not society that pays the price of managing a social problem and it even may happen that those being protected by the law have to bear the social costs. Moreover, the outcome, closing the school, has negative consequences for those who should be the beneficiaries of the policy. Private law cannot re-allocate the (social) costs of anti-discrimination measures and, for this reason, the costs of enforcing anti-discrimination measures may only be shifted to certain market players or to those who belong to the protected group of society. In a great number of anti-discrimination cases, courts try to solve the problem of social segregation with means not designed for this purpose. Even if the aims and the decisions in a great number of cases are clear, courts are unable to address consequences that surely have an impact beyond the relationship of the parties. We have to face the problem that the application of private law rules and principles modelled on horizontal relationships may involve pursuing social policies but the effects of such regulation or practice require further coordination and cost allocation going beyond the scope of private law.

The intersection of the *Gyöngyöspata* judgment and the subsequent legislative step illustrates a crisis in social governance. The use of regulatory power to overrule judicial findings undermines the function of li-

ability and leaves the fundamental issue of social integration unresolved, shifting the burden of social exclusion from the school system to other, equally ill-equipped social structures.

4. Supreme Court, Kúria Gfv VII 30.135/2020, 22 September 2020, BH 2021 no 172[10]

The case addresses the issue of liability for reflective loss and shareholder standing. The plaintiff's legal predecessor held an equity interest in a private limited company (the 'company'). The company entered into a fixed-term service agreement with defendant 1, the entity vested with the management and trusteeship of public roadways. The subject of the agreement was the installation and maintenance of a 16-duct optical fibre network along a motorway. Following the completion of the technical installation, a substantial delay occurred in the issuance of the final authorisation for commencement of operations, the operating licence. During the pendency of this delay, the plaintiff's legal predecessor executed a Share Purchase Agreement and an Assignment of Claims, transferring both its equity stake and its potential causes of action for damages to the plaintiff. The plaintiff asserts that the delay in the licensing procedure caused a diminution in the value of the company, which directly resulted in a reduced share price at the time of divestment. The court of first instance dismissed the claim, applying the principle that a shareholder lacks standing to recover for reflective loss. The court's main finding can be summarised as follows: a shareholder is generally precluded from claiming compensation if the diminution in the value of their shares is a mere reflection of the loss sustained by the company. The enforcement of the company's own claim against the tortfeasor is a condition-precedent or preliminary issue to assessing the admissibility of a shareholder's individual claim. The court concluded that a shareholder may only seek compensation for that portion of the share value diminution that remains unredressed after the company has exhausted its own legal remedies or asserted its claims.

The case highlights a persistent lack of coherent doctrine in Hungarian civil law regarding the intersection of corporate assets and shareholder rights. The company's loss of physical or liquid assets is substituted by a claim, that is, a claim for damages. From this follows that there is an identity of the claim of the company and the claim of the shareholder as an asset. Thus, while the company's book value may fluctuate, the claim

[10] *A Menyhárd,* Hungary, in: E Karner/BC Steininger (eds) European Tort Law (ETL) 2021 (2022) 266, nos 23–25.

itself constitutes an asset. However, the market value of a litigious claim rarely equals its nominal value, creating a realised loss for shareholders who leave the company prior to adjudication. A critical temporal dimension also exists when a shareholder suffers a loss by selling their interest at a reduced price *before* the company receives indemnification. In such instances, the shareholder's loss becomes permanent and depends on the company's future recovery. While the judgment aligns with the developmental trajectory of the past two decades, it fails to provide a definitive legal standard for the liquidation of claims and for predictability. Liquidation of claims refers to whether the liquidation, that is, the formal quantification and pursuit of the company's claim, must be completed before a shareholder's derivative claim can be deemed admissible, while predictability is the absence of a consistent doctrine regarding whether establishing the loss of share value is precluded per se or merely suspended pending the company's action.

5. Supreme Court Resolution no 2 of 2022 JEH (Jpe.III.60.011/2022/15)[11]

The case addresses how material damages in wrongful birth cases should be assessed. The resolution establishes that the costs of bringing up a child born with a genetic or teratological deficiency, as a compensable loss in the context of liability of the healthcare provider in wrongful birth cases, should be the difference between the costs of bringing up a healthy child and a child with such deficiency. In Hungarian tort law, claims for wrongful life, asserted on behalf of the child, are precluded under Resolution 1/2008 of the Supreme Court, while the judiciary recognises wrongful birth claims. These actions arise where a healthcare provider's failure to provide accurate or timely prenatal information constitutes an unlawful interference with the mother's inherent right to self-determination and reproductive choice. Following the enactment of the Civil Code (2013), such cases typically give rise to a claim for *solatium doloris* to address non-pecuniary loss. However, alongside claims for non-pecuniary damages, claims for damages compensating pecuniary loss as covering the financial burdens of child-rearing are emerging.

The assessment of the appropriate amount of pecuniary damages in such cases has been a point of contention within the Hungarian courts.

[11] *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 295, nos 2–9.

The Supreme Court's 2015 ruling[12] became the leading judgment. In this case, the Supreme Court adopted a broad theory of causation, stipulating that the healthcare provider was liable for the full costs of the child's upbringing. This approach was predicated on the 'but-for' principle, asserting that no maintenance costs would have been incurred had the medical negligence not deprived the parents of their choice to terminate the pregnancy. Under this standard, overruled by Supreme Court Resolution no 2/2022, all expenditures causally linked to the birth were held to be recoverable losses.

The legal standard that prevailed in line with the leading judgment of 2015 was subsequently redefined by the Supreme Court in Resolution 2/2022 JEH, which expressly overruled that practice. The *Curia* shifted the focus from purely factual causation to a value-based concept of compensable loss. Central to this resolution is the principle that human life constitutes an utmost protected constitutional value; consequently, the existence of a child cannot, under any legal theory, be categorised as a harm or loss within the scope of tort law. The Court established that the law must not distinguish between healthy and disabled lives in a manner that suggests non-existence is a more advantageous or preferable state.

Under this binding interpretation, the compensable loss is strictly limited to the additional burden placed upon the family unit. The healthcare provider's obligation to compensate the victim is restricted to the marginal difference between the costs associated with raising a child with health impairments and the hypothetical costs of raising a healthy child. The basic costs of subsistence and upbringing are excluded from the scope of liability, as these expenses arise from the existence of the child rather than the medical impairment itself. Furthermore, the Court clarified that a difficult life or a general change in the quality of life resulting from the birth of a child – whether healthy or handicapped – does not constitute an adverse change in legal status sufficient to warrant compensation for basic maintenance. Therefore, the defendant healthcare provider shall only be held liable for specific, incremental costs related to care, education, and maintenance necessitated by the genetic or teratological defect. Any judicial award that extends beyond these additional expenses is deemed contrary to the fundamental legal principle that the birth of a child cannot be treated as a compensable loss.

If the court does not limit compensation to the additional expenses, this is contrary to the general principle of law that the existence of a child cannot be considered as a loss under any circumstances. Taking all this

[12] Supreme Court, Kúria Pfv 20.069/2015/3 EBH 2015 P.11.

into account, the *Curia* held that, since the existence of a child born with a genetic or teratological deficiency cannot be deemed as damage, the concept of material damage cannot include all the costs of bringing up a child, but only the additional costs arising from the health impairment. In this respect, the compensation of the basic upbringing costs cannot be covered by the liability of the healthcare provider.