Conclusions of the summary report on the jurisprudence related to the reduction (loss) of chance for health recovery (survival)

In 2019, the President of the Curia set up a jurisprudence-analysing working group to examine the jurisprudence related to the reduction (loss) of chance for health recovery (survival).

The examination concerned cases related to the health deterioration, during or closely following the provision of medical care, of persons already suffering from a fatal disease or from a health impairment having occurred before the provision of the medical service and to failures of hoped-for health improvements, potentially all caused by a wrongful and imputable act of a health care worker, but involving an element of uncertainty as to the existence and extent of a causal link, since the harm and/or the extent could have occurred by itself even under proper medical care, due to the underlying health conditions. The difficulty of the legal assessment of such cases resulted from the fact that the mere possibility of causing harm could not be fitted into the natural causation doctrine of delictual liability used in civil law, according to which the relationship between two events was either causal (in part or in whole) or not causal (at all).

The reason for carrying out the jurisprudence-analysis was that in the assessment of this legal question Hungarian judicial practice changed significantly and several times in the 25 years preceding the analysis and it did not show a uniform picture at the time of the analysis. Until the end of the 1990s, the liability of a health care provider could not be established unless a factual causal link was proved. From the turn of the millennium onwards, however, a complete change of direction began: it became sufficient for a plaintiff to prove that the damage occurred during the treatment provided by the respondent. To escape liability, the respondent had to prove that the patient would not have had the chance to get into a better health condition even if due care had been exercised. Judicial practice removed the question of the chance of recovery from the scope of causation and transferred it to the scope of imputability. It reversed the burden of proof and required the respondent to prove the absence of causation. After the 2010s, some regional courts of appeal tended to adjust the legal liability of the healthcare provider to the degree of the frustration of the chance for recovery (survival).

The working group also analysed the practice of several European countries. The analysis showed that in those countries basically two main concepts prevailed: the principle of all or nothing, and the principle of proportionality. In the former case, the causal link between the harmful conduct and the medical harm suffered had to be proved and the burden of proof was essentially on the plaintiff. In Germany, the burden of proof could be reversed depending on the severity of the error in the treatment/care, while in the UK and Switzerland a lower degree of certainty (probability) was sufficient. The countries applying the principle of proportionality (France, Belgium, the Netherlands, Spain, Austria, Poland, Romania) imposed liability on the medical service provider in proportion to the frustration of the chance for recovery (survival) and the probability of causation.

The practice of the Curia of Hungary (formerly the Supreme Court) was consistent in the 20 years preceding the analysis: it assessed the chance of recovery or survival not in the context of causation, but in the context of imputability. Proving by the plaintiff that a death or health deterioration occurred during or at the time of the treatment, or subsequently but in connection with the treatment, was sufficient, the specific conduct or omission leading to the harmful result

did not need to be identified. The burden of proving that the medical service provider acted with due care and/or that the health damage or death could not be and could not have been avoided despite the exercise of due care, was imposed on the medical service provider, and successful proving could result in being excused from liability. Excuse from liability resulted in the dismissal of the action whereas non-excuse resulted in a finding of liability for the medical harm suffered, provided that the patient had a genuine chance of recovery or survival. The notion of 'genuine', however, could not be linked to a percentage rate, it depended on the circumstances of the given case.

The majority of the members of the working group were of the opinion that there was no reason to change this practice.