

The Hungarian system of the legal relationships which determine the civil responsibility of the healthcare service providers¹

Dr. Judit Zákány

Key words:

civil responsibility, healthcare service providers, patient, liability insurer.

I. Induction

The aim of my paper is to demonstrate the legal relations which are fundamentally important in Hungary in the view of the civil responsibility of the healthcare service providers. I want to analyze three legal relationships, first to demonstrate the legal relationship between the healthcare service provider and the patient. This is important because the feature of this relationship determines which liability rules are applied in the suits for damages by the courts against a healthcare service provider. By the effect of the new Hungarian Civil Code, the V. Act of 2013 on the Civil Code (hereafter: Ptk.) the liability rules have changed fundamentally, and this has required the change in the liability rules of the healthcare service providers, which will be also mentioned in my study.

The next relationship which will be demonstrated is the legal relationship between the healthcare service provider and the liability insurer, which is important because of the financing of the amount of the compensation. The liability insurance contract is destined to guarantee the legal and the wealth safety both to the healthcare service provider and the patient in cases of the culpable tort arising during the healthcare service. Sadly, because of the existing problems – which will be also demonstrated – in many cases the amount of the compensation is on the budget of the hospital.

The third legal relationship is the legal relationship between the healthcare service provider and the medical employee, which influences many factors. This is fundamentally important in this topic, because it determines who has the direct obligation for the damage arising during the healthcare service and it determines the possibilities to fend on the amount of the compensation.

In the end the – by the analysis of the legal relationships – the reader will become acquainted with the possible application of the delictual and contractual liability rules in a medical action for damages in Hungary, and with that who and in what form is responsible if the healthcare service provider is condemned.

II. The legal relation between the healthcare service provider and the patient

One subjective of this legal relation is the healthcare service provider, so – irrespectively of the proprietary form and conservator – every individual medical contractor, legal person or organization without legal personality which has the operational permit from the medical government body and is entitled to service healthcare service². The patient is the person who has resort to the medical activities – connected to his health condition – so the medical service, or the person who takes part of the mentioned ones³.

There are disputes between the jurisprudence and the practice about the nature of the legal relation. One question is which area the legal relation belongs to. According to the earlier Health Act from 1972, some literates say that this relation is an administrative relation⁴. It is a serious problem that according to this idea, the patient

¹ This study was written within the framework of the OTKA PD_16 postdoctoral application. (120901 ÁJP has been implemented with the support provided from the National Research, Development and Innovation Fund of Hungary, financed under the PD_16 funding scheme).

² CLIV. Act of 1997 on Health (továbbiakban: Eütv.) 3. § f) point.

³ Eütv, 3. § b)-c) points.

⁴ Jobbágyi G. Az orvos-beteg jogviszony az új Ptk.-ban. Polgári Jogi Kodifikáció. 2005. № 3. P. 15.

is a client and is an underling to the provider – by the specialities of the public law relations. Instead of this the ruling theory is which says that the relation between the healthcare service provider and the patient is fundamentally belongs to the private law, more correctly to the civil law and has administrative elements⁵.

The other question on this legal relation is to decide whether there is or isn't a direct contractual relation between the parties? The jurisprudence and the practice has different opinion. In most cases of the courts on the liability of the healthcare service providers, judgements have been born on the base of the torts which are actionable per se, and there hasn't been any reference to the prior contractual connection between the parties⁶. There are judgements when there are expressly: in which it is expressed that "the aggrieved party has no contractual connection with the healthcare service provider, but there was a medicinal operation based on the state insurance"⁷. Against this, the representatives (for example: K. Törő, G. Jobbágyi, J. Sándor, A. Dósa, I. Kemenes, A. Szeghő) of the jurisprudence say that it is not the tort which causes a relative legal relation between the healthcare service provider and the patient, but the contractual connection is born by the use of the service. The debate was decided by the § 244 from the CLIV. Act of 1997 on the Health Care (hereafter: Eütv.) in January 2010, which says: "in cases of the claims which are correlating to the healthcare services, the rules of the liability from the civil law must be applied".

We can name a – from the other ones – special feature of creating a legal relation between the healthcare service provider and the patient: the contracts are often born with an implied conduct, the recourse of the service. In this legal relation, many elements of the principle on contractual freedom partly prevail. For example, in the area of territorial supplying obligation and in the case of urgent need, the provider doesn't have the contractual freedom or the freedom to choose partners, he must enter into a contract. But the patient does not have the right to choose about entering a contract, for example in case of authorial medical interventions or compulsory vaccinations. The freedom of the contractual content is limited, because the health care rules have operative role in determining the content of the contract, these rules prescribe rights and obligations for both parties, and the written and unwritten professional rules in connection with the medical activity have operative role too⁸. The obligation of communication and information is determinative in the legal relationship.

This legal relation is often related to the mandate contract – from the named contracts – because – in both cases – the point is the careful, professional and ethical proceeding of the healthcare service provider and the activity is not engaged to a result⁹. Although there are specific features of the mandate contract which can't be applied in this specific legal relation. For example, the right of order of the client has other meaning in the relation between the healthcare service provider and the patient. The Eütv. gives the choice of the investigational and therapeutical method as a right for the therapist with the limitation that the patient must accept the method after the appropriate information. So, the right of order is limited, it incarnates in the right of autonomy¹⁰. The feature of the mandate contract as the obligation of personal proceeding, and the rare possibility of employing a contributor. In connection with the healthcare services this feature is not always there. It is there when the patient resorts the service of a private doctor, but the health care institutions have become multidisciplinary factories, there is the division of labour, many employees work in service, simultaneously or sequentially. In this meaning, the personal proceeding can't be interpreted, so the confidential element – which is typical for the contract – has a minor role¹¹. The mandate contract is often about the representation of the client, which in a legal relation between of a doctor and a patient also does not prevail, the subject of the contract is not the representation of the patient. Paying the fee is specific in the case of resorting a public-financed service, because in

⁵ There are cases when the aim of the medical activity is public – besides the aim to cure the individual patient – and the patient has no choice about the preventive curing (for example compulsory vaccinations, compulsory medical examinations, measures against contagion). The administrative elements occur in cases for example when the doctor decides about disability or the loss of capacity or doing forensic activities (Törő K. Felelősség az orvosi működésért – Orvosi műhiba. Magyar Jog. 1987. № 2. P. 137).

⁶ Havasi P. Összefoglaló jelentés az orvosi műhiba perek gyakorlatának áttekintéséről, különös tekintettel a nem vagyoni kártérítésre. Budapest, 2008. P. 17.

⁷ LB Pf. III. 25.898/2001/5.

⁸ Jobbágyi G. Az orvos-beteg jogviszony az új Ptk.-ban. Polgári Jogi Kodifikáció. 2005. № 3. P. 17.

⁹ There are cases when there is the liability for the result, so the enterprise-feature of the contract. There is the obligation for result for example in the case of making a prothesis, and some dental interferences, or some plastic interferences have enterprise-feature too (Hídvéginé Adorján L., Sáriné Simkó Á. Műhibák és kártérítési perek az egészségügyben. Budapest : Medicina Kiadó, 2013. P. 18).

¹⁰ Sándor J. Gyógyítás és ételkezés. Budapest : Medicina, 1997. P. 59.

¹¹ Szeghő Á. A kezelési szerződés. Acta Conventus de Iure Civili / T. Papp (szerk.). Szeged : Lectum Kiadó, 2009. T. XI. P. 83.

this case the financing of the service happens not directly, but through the state insurance¹². If the patient goes directly to a private service provider, he pays directly the costs of the service.

I must mention that at the same time when the V. Act of 2013 on the Civil Code (hereafter: Ptk.) entered into force, the § 244 from the Eütv. was modified, so now it orders to apply the criminal liability rules of the Code to the liability of the healthcare service providers. The change was needed because the liability system of the new Ptk. has significant changes according to the prior Code, the parallel regulations of the criminal and contractual liability has narrowed, the rules of the liability for the damages caused by breaching the contract have placed to new, more objective bases, the possibilities of the explanation have become stricter.

Separating sharper the rules on torts and the rules on contractual liability in the new Civil Code is an acceptable, logical move, and this comply with the judicial practice¹³ and the international documents¹⁴. The liability comes from different legal relations each case. In the case of liability of rules on torts the first base is an absolute legal relation, which becomes into a relative obligation between the injured party and the tortfeasor because of the tort. In this case, the general ban of the tort is injured. Contrarily, the conclusion of a contract means a knowingly undertaken risk, in the case of breach of the contract there is the breaching of predetermined obligations between determined parties, and the breaching party has to honor these, and has to ensure the compensation of the caused damages. The patterns for the liability concept were the contracts in business relations. Anyone, who does businesslike activity, taking risks, in the case of breach of the contract the sanction can't depend on the sedulity of the breaching party, the reasonable behavior in the actual situation can't be sufficient base for the explanation.

However the contractual relation between the healthcare service provider and the patient is a special area, for which the changes in the liability system – motivated by the contracts of the business area – aren't applicable fully. Just think for example the healthcare services within the confines of territorial attendance obligation – in these cases the institutions don't have deliberation possibility whether or whether not to conclude a contract with the patient, so they can't be exempted from the service obligation¹⁵. This is a significant difference compared to the business contracts, in these cases of the latter ones the contractual risk is a volunteer decision, so the increased liability is reasonable.

In Hungary there is a very strict judicial practice on the liability of the healthcare service providers, the explanation is hard even in the imputation system for the healthcare service providers.

The new, objective system of the liability for the damages from breaching the contract would have unforeseeable consequences if it was applied for this legal relation. The legislator has recognized and remedied properly the problem with the changing the § 244 of the Health Act, which orders that the rules on criminal liability – based on imputation – of the new Civil Code must be applied in the case of the liability of the healthcare service providers.

III. Legal relation between the healthcare service provider and the liability insurer

If the harmed patient, or his relative sues for damages, the action must be started against the healthcare service provider. In point of the extent of the financial liability of the healthcare service provider, the contract with the liability insurer and its elements are fundamental, so I will analyse them hereafter.

In the phrasing of the Civil Code of Hungary (hereafter: Ptk.), an insured party is entitled, on the basis of a liability insurance contract, to request the insurer to exempt him, up to the limit specified in the contract, from paying for damages for which he is legally liable¹⁶.

The characteristic of the liability insurance that it makes a special legal relation with three subjectives by linking an insurance and a damage obligation legal relation¹⁷. The insurance contract is made between the insurer and the insured. The insured is also a subjective of the damage obligation, he is responsible for the dam-

¹² Kovácsy Z., Dósa Á. A vállalkozó orvosok nagy kézikönyve. Budapest : Complex, 2011. P. 672.

¹³ Menyhárd A. Felelősség szerződészegésért. Polgári Jogi Kodifikáció. 2001. № 3. P. 25.

¹⁴ E. g. the relevant rules of the CISG and PECL (Csécsy A. Előreláthatósági klauzula a szerződések jogában. Debreceni Jogi Műhely. 2009. № 1. URL: http://www.debrecenijogimuhely.hu/archivum/1_2009/).

¹⁵ Kereszty É. A helyi önkormányzatok és az egészségügyi szolgáltatók kapcsolata. Magyar Közigazgatás. 1999. № 11. P. 620.

¹⁶ Ptk. 6:470. § (1).

¹⁷ Jobbágyi G., Fazekas J. Kötelmi jog. Budapest : Szent István Társulat, 2005. P. 374.

age, but he is not every time the tortfeasor¹⁸. The other subjective of the damage obligation is the harmed party, whose damage is compensated – fully or partly – by the insurer, instead of the insured one. So, the liability insurance is the security of the satisfaction of the damage obligation, an establishment of the obligated part, which makes it possible – maintaining the original obligatory situation and without changing the subjectives – for the insurer to comply instead of the obligated¹⁹.

In 1989 the pursuance of private medical practice and healthcare enterprises was authorized. The provisions of law on licensing²⁰ first required mandatory liability insurance in the abovementioned two areas. Despite the fact that in this period there was no mandatory liability insurance for state-run healthcare institutions, almost all of them have purchased coverage by 1992. In the initial period, insurers also enthusiastically embraced the opportunities inherent in the new market and competed for satisfying the needs of hospitals with a diversity of offers. The Eütv. extended the obligation of purchasing liability coverage to all healthcare service providers²¹. Initially the system worked well, and it meant real safety for the service providers, assurance for the patients that the damages would be paid and, also a new source of income for the insurers. Changes of the ideal condition as described above and the decline of our medical liability insurance system can be primarily traced back to the change in the practice that can be observed in the lawsuits against the healthcare service providers. This was the circumstance disrupting the identity of interests that had previously existed between insurers and service providers. It was only in the interest of profit-oriented insurers to provide the service as long as it generated a profit for them. However, between 1997 and 1999, the proportion of the income from the insurance premiums relative to the insurance amounts paid began to gradually deteriorate. Due to the increase in the number of lawsuits and the amounts paid, this line of business was no longer profitable, and insurers recognized that it was no longer in their interest to provide insurance services in this market segment²².

In the following, I would like to highlight three factors that were, in my opinion, the genesis of all other problems. Firstly, the dwindling of the supply side of the insurance market. Currently there are a few insurance company that offers its service to all healthcare providers, which means that there is practically a monopoly on the market. Furthermore, there is a unilateral obligation to contract, since the healthcare service provider is required to take out liability insurance as a condition of its operating permit²³, but the insurer will only conclude a contract with a healthcare provider if and when it is worth it for them. Finally the relevant authorization has been declared for more than a decade, the Hungarian Government still has not issued the decree concerning the minimum conditions of professional liability insurances for healthcare service providers²⁴. As a result, nothing else determines the detailed rules of operation of this special type of liability insurances than the business policy, i.e. the general terms and conditions of the insurance company. These general terms and conditions, on the other hand, include numerous elements that are unfavourable for the institution and that do away with the essence of the liability insurance and disregard the original aim of this legal institution.

In the following, I will mention some problematic contractual provisions set forth by the insurers. Insurance premiums have increased significantly in recent years²⁵. The level of the services provided by the insurer, however, did not increase. The insurance limits are still at the level they were 15 years ago, generally 5 million HUF

¹⁸ For example, when the health institution makes the liability insurance, claims will be against this institution, the liability is its, but the real tortfeasor is the doctor who is in a legal relation with the institution.

¹⁹ Gergely E., Péterffy É. A felelősségbiztosítás. Szolnok : Biztosítás Oktatási Intézet, 1998. P. 12.

²⁰ 30/1989. SZEM rendelet, 113/1989. MT rendelet.

²¹ Eütv. 108. § (2) bekezdés.

²² The so-called first insurance crisis (Simon T. Kezelhető-e a szakmai felelősségbiztosítás Strucc Malvin módjára? Kórház. 2005. № 10. P. 15).

²³ Eütv. 108. § (2) bekezdés; 96/2003. korm. rendelet az egészségügyi szolgáltatás gyakorlásának általános feltételeiről, valamint a működési engedélyezési eljárásról 6. § (3) bekezdés; 2003. évi LXXXIV. törvény az egészségügyi tevékenység végzésének egyes kérdéseiről 7. § (1) bekezdés e) pont.

²⁴ The closing provisions of the Healthcare Act originally only gave an authorisation to the Minister of Health to draw up the detailed rules of the liability insurance of healthcare service providers. This provision of the Healthcare Act was amended in 2002. The Government has since had the authority to create the relevant decree (Section 247 (1), point f) of the Healthcare Act); however, this decree has not been adopted since.

²⁵ Harmat G. Az orvosi felelősségbiztosítás kérdései és lehetséges válaszai. Egészségügyi gazdasági szemle. 2003. № 6. P. 36.

per insurance event²⁶. Damages above this limit are paid by the hospital from their own budget, i. e. the amount earmarked for running costs, or the maintaining entity fulfils the payment obligation.

Insurers interpret the concept of insurance event in an increasingly narrow way, and risk factors causing large amounts of damage are excluded from those covered, thereby practically dissipating the essence of liability insurance. The problem is that these exclusions²⁷ are beginning to take irrational proportions, and insurers are now excluding entire medical fields (e. g. plastic surgery), diagnostic methods (e. g. CAT, MRI, X-ray) from the coverage they provide. In addition insurers exclude claims based on the failure or insufficiency of information, despite the fact that this is the legal grounds most frequently identified by patients²⁸. Among the exclusions there also appeared damages caused in connection with obstetrical and gynaecological activities, from the onset of labour until midnight of the fifth day after delivery²⁹.

Several strong reasons can be enumerated to support the importance of restoring the operability of the system as early as possible. The most urgent problem is that in the current situation there is no adequate solution for the financing of insurance events occurring in the course of providing healthcare services. As mentioned above, the approximately 5 million HUF limit offered by insurers is far less than the tens or hundreds of millions claimed. We could say that the proportions of payment have almost been reversed in such a way that the insurer pays the amount corresponding to a deductible³⁰, and the healthcare institution has to pay the amounts above that. The other issue that I would like to emphasise is that the solution must also be found because of our obligation to harmonize with the laws of the European Union. In case the Directive on cross-border healthcare is adopted, there will be pressure from the EU on the member states, including on Hungary, to institute an efficient liability insurance system or other guarantees for the financing of insurance events occurring in the course of the healthcare services³¹.

In point of the liability insurance of the state healthcare service providers there is an actual fact, that the National Healthcare Services Center (hereafter: ÁEEK) has the competence to conduct public procurement procedures contractedly in case of the health institutions which are under its direction³². On behalf of this, the ÁEEK and the health institutions have made an agreement on conducting the public procurement procedure. The ÁEEK by the licence and in the name of the health institutions as prospective constructors conducted an explicit public procurement procedure in 2016 to procure an insurance service. As a result of this the prospective constructors have made their contracts one by one with the insurer³³. Unfortunately, this procedure has not changed much in connection with the contractual terms, so it has not given a solution.

IV. Legal relation between the healthcare service provider and the medical employee, and other healthcare service provider

If the patient or his relative sues for damages successfully against the healthcare service provider, in the view of shifting off the payed amount it is significant that which legal form is used to occupy the medical employees who have had part of the service of the injured patient. The legal form of the healthcare service provider is also significant, and if the healthcare service provider has contractual connection with other healthcare service provider this also can affect to shifting off the damage.

²⁶ 5 million HUF per insurance event (in exception cases, 8 or 10 million HUF), with a maximum of 50 million HUF per year. By way of comparison: in case of automobile liability insurance, the limit is 500 million HUF per insurance event for damage to property and 1 250 million HUF per insurance event for personal injury.

²⁷ The exclusions are discussed on the basis of the general terms and conditions published by the insurance companies.

²⁸ Dósa Á. Az orvos felelőssége a tájékoztatás elmulasztásáért. *Legis Artis Medicinae*. 2001. № 1. P. 15.

²⁹ This exclusion is only in the terms and conditions of Allianz Hungária Zrt.

³⁰ The essence of a deductible is that the insured is to bear a certain part of the full insurance amount, as defined in the insurance policy. The extent of the deductible is typically 10% per insurance event. The deductible must only be paid if the insurance amount remains within the limit of the insurer per insurance event, and therefore, its main point is that the healthcare service provider cannot escape the payment obligation, not even if the damages awarded are lower than the insurance limit.

³¹ The draft version of the Directive on cross-border healthcare, page 14.

³² According to the 27/2015 (II. 25) government decree 5. § l) point.

³³ Nyílt közbeszerzést írt ki az állami egészségügyi ellátó központ 96 kórház biztosítására. URL: http://www.biztositasizemle.hu/cikk/hazaihirek/nemeletbiztositas/nyilt_kozbeszerzest_irt_ki_az_allami_egeszsegugyi_ellato_kozpont_96_korhaz_biztositasa-ra.5772.html.

The possible forms of the healthcare activities are determined by the LXXXIV Act of 2003 (hereafter: Eütev.)³⁴, which can be various. A person can do medical activity in more legal relation even at the same provider, but it is important that the medical activity can't be more than 60 hours a week, on average 12,6 hours a day – within a month³⁵.

In the following sectors I will mention some legal forms which have important role in practice, in the middle there will be the liability rules in connection with these legal relations. The stress is on compensating the damages caused to a third, outside party in connection with the legal relation. First, I chose the legal possibilities, to which the operational permit of the healthcare administrative organization is not necessary. In these cases the activity is done in the name of a healthcare service provider which has operational permit and in a contractual legal relation with it. In this case I will analyse the labour relation, the public servant legal relation and the professional legal relation.

The common employment form of the Hungarian medical employees is the public servant legal relation, and the medical activity which is done in a labour relation. The XXXIII Act of 1992 on the public servants (hereafter: Kjt.) orders that for the other, unregulated questions the I Act of 2012 on the Labour Code (hereafter: Mt.) should be applied³⁶. Subjectives of the public servant legal relation are the employer and the public servant, labour relation is made between the employer and the employee. For doing medical activity by public servant, or the employee, the appropriate qualification is necessary. Public servant legal relation can be made by competition, the legal relation is born by nomination and its acceptance. The labour relation is made by signing the labour contract which testifies the mutual and concurrent manifestation of will of the parties. The liability rules of the two form are connected strictly, so they will be demonstrated side by side. If the employee or the public servant causes damage to a third party in connection with the labour relation or the public servant relation, the employer is liable for the injured party directly³⁷. In the case of obligation to fulfil his commitment, the provider has the chance to devolve a part of the damage to the employee – in consideration of the form of the medical activity. According to the rules³⁸ of the Mt., the employee and the public servant is responsible fully in the case of willful and recklessly careless tort too, in other cases he is responsible with his 4 months absence fee maximum. This rule would make significantly harder even the position of the most protected medical employee in labour relation and public servant relation in regard to the wilder liability of the healthcare service providers, the increase of the fees for damages and the explanation from the liability getting harder. The legislator has got wise to this fact and the necessity of the special regulation for the healthcare services. With the § 15/C of the Eütev. he has overwritten the mentioned rule of the Mt., but not generally, only in point of the damages caused for the patients with the medical activity. Although the orientation is favourable, I think that the rule must be modified not only in relation to the damages caused to the patients, because in suits for damages the claims from the relatives are frequent and mean large amounts. So the rule must be applied to these, which says that in the case of careless tort the amount of the compensation is maximum 4 months absence fee of the employee.

The main point of the professional legal relation is that the medical employee engages to do a medical activity – to which he has the competence – in a mandate contract. A special mandate contract is born between the parties with the elements determined by the Eütev³⁹. The factual terms are secured – essentially – by the healthcare service provider, which pays a fee – determined in the contract – for the professional activity. The professional legal relation is an appropriate solution if the employee. The professional legal relation is an appropriate solution if the employee wants to take part of an activity of a bigger, or private healthcare service provider on some occasions weekly for some hours, wants to take part of duty activities, but he does not want to work as a healthcare contractor, or he does not have the personal and objective terms which are necessary for the operational permit⁴⁰. If the professional causes damages to the patient or to his relative during the healthcare service or correlating with it, the liability is based on that if he is a legal relation with a healthcare public service

³⁴ According to this, everyone who has appropriate skill has the possibility that as a professional, or medical contractor, or a member of a joint business, member of an individual firm, ecclesiastic, volunteer he can do medical activity in labour relation, public servant relation, government serving relation, state serving relation, serving relation. [Eütev. 7. § (2)].

³⁵ In point of duty work, only the term of the actual medical activity must be taken notice of. [Eütev. 5. § (5)].

³⁶ Kjt. 2. § (3).

³⁷ In accordance with Ptk. 6:540. § (1) rule, 19/A § from the Eütev.

³⁸ Mt. 197. § (3).

³⁹ Kovácsy Z. *Az egészségügyi jog nagy kézikönyve*. Budapest : Complex, 2009. P. 241.

⁴⁰ Varga A. *Magánpraxis alapítása II. Med et Jur*. 2013. № 2. P. 17.

provider⁴¹ or healthcare private provider⁴². In the prior case the healthcare service provider – which gives the public service – honors obligations directly towards the injured party, which can sue the tortfeasor professional by the rules of the civil law⁴³. There isn't any special protocol for the healthcare service providers who service private service, for them the rules on the mandate contracts from the Ptk. must be applied. According to these, if the mandated – in his position – causes damages for a third party, he has joint and several liability with the principal. The principal can be excused if he can prove that he has acted as it has been reasonable under the circumstances with choosing, instructing and supervising the supervising the mandated. If there is a permanent mandate between the healthcare service provider and the professional, the rules on the healthcare public service providers must be applied. But, if the mandated has caused the damage willfully, he has joint and several liability with the principal⁴⁴.

Hereinafter I will deal with the legal possibilities, when the medical activity can be done only with operational permit. The subjectives who have operational permit are healthcare service providers, so they give medical services in their own names. According to the law, private healthcare enterprise, private firm, and joint enterprise must require operational permit (from the Chief Medical Officer or the township office – depending on the feature of its activity)⁴⁵ to work as a healthcare service provider. For this, it must complete the personal and objective terms from the acts⁴⁶ and must make liability insurance.

Operational permit can be given to private healthcare enterprise from the administrative healthcare organization if it has qualification, it is in the operational register of the medical employees, it proves its health competence, and the planned medical activity is not limited by the law, or the law does not name a specific healthcare service provider to this planned activity. The condition to start the work is to report the activity to the organization which making the register of the private enterprises⁴⁷, this report is free⁴⁸. The benefit to work as private enterprise that there is not a boss, but the terms to get the operational permit must be made, and this means costs. As to the liability for damages, the private healthcare enterprise is liable with its whole private wealth for the damages caused in connection with the medical activity, and it is can be limited only by the mandatory liability insurance. If the enterprise has an employee, and he causes damage in connection with the healthcare activity to the patient or his relative, the healthcare enterprise will be responsible in front of the injured party, but in the case of willfull tort the enterprise can avoid the whole amount, in the case of negligent tort the enterprise can avoid maximum 4 months absence fee to the employee.

The private firm – acting as a healthcare service provider – is strictly connected with the prior legal form, because this form – without legal personality – can be founded only by a private enterprise. This possibility is favourable for everyone who wants to act not in their own name, but under a corporate name, and a private firm can turn into other business association⁴⁹. The private firm is born with the registration to the register of companies, and at the same time, the status of the private enterprise ends⁵⁰. A private firm can have only one member, but the firm can have employee in employment relationship. As to the liability, if there is a loss during the healthcare activity, the private firm will be liable towards the injured party directly. For the debts which are not covered by the wealth of the firm (to found the firm the law does not require a minimum subscribed capital) the founding member will be liable fully, with his whole private wealth. In the case of the tort caused by the employee, the mentioned rules on the employees of the private enterprise are applied.

Business association can do healthcare activity too, the work can be done as a member of a joint enterprise. It is indispensable to found a business association to draw up the the instrument of constitution in a notarial

⁴¹ Under healthcare public service the legislator means a healthcare service which is – partly or fully – financed by the central budget and the Healthinsurance Foundation (CXXXII. Act of 2006 on innovating the healthcare supplier system).

⁴² Hídvéginé Adorján L., Sáriné Simkó Á. Műhibák és kártérítési perek az egészségügyben. Budapest : Medicina Kiadó, 2013. P. 23.

⁴³ Eütev. 19/A.

⁴⁴ Ptk. 6:542; 6:540.

⁴⁵ 96/2003. (VII.15.) government decree 6. § (1) and 7. § (2).

⁴⁶ Eütv. V. chapter, 60/2003 (X. 20.) ESzCsM decree.

⁴⁷ At present, this organization is the Central Office for Administrative and Electronic Public Services.

⁴⁸ 2009. évi CXV. törvény 8.

⁴⁹ Rónai F. Az egyéni cég előnyei. URL: <http://www.gymskik.hu/download.php?id=2844>.

⁵⁰ To ban the unlimited liability, the member of the private firm can't be – at the same time – private enterprise, general partner of a limited partnership, or member of other private firm. [CXV. Act of 2009 20. §, 27. § (3)].

document, or in a private document countersigned by a lawyer, which have to be signed by all of the founders⁵¹. The administrative healthcare organization with competence can give operational permit to the association, if the planned medical activity is not limited by the law, or the law does not name a specific healthcare service provider to this planned activity. And because the medical activity is connected to qualification, it is necessary that the enterprise has at least one member who constructs personal cooperation, or has at least one person who is in employment relationship or civil law contractual relationship with the association, and who suits the qualification requirements⁵², who is in the operational registration of the medical employees and proves his competence⁵³. This legal possibility is practical in the case when more medical employees want to cooperate permanently, it has the advantage that they can prove the necessary terms – to the service – more easily together, they can partake from the common gain and have the chance to make a uniform image⁵⁴. In Hungary there is form pressure for the business associations, they can be founded only in the forms determined by the law. In Hungary joint enterprises operate mostly as limited partnerships or limited liability partnerships. In the prior case the costs of the foundation are more favourable, because the law does not require a minimum subscribed capital for the limited partnership. For the obligations of the healthcare service provider – in the form of a limited partnership – so for the case if its member or employee causes damage during the medical activity for the patient, principally, the association will be liable with its whole wealth. But, for the debts which are not covered by the wealth of the association, at least one general partner is liable with his private wealth vicariously and unlimitedly. The foundation of the limited liability partnership is more expensive, because it needs minimum 3 million Ft subscribed capital⁵⁵, but the financial liability of the members – fundamentally – reach only to the paid primary stake, so they are in a more protected legal status in the case of an action for damages.

The healthcare service providers can act in their own names and liabilities – as it was mentioned earlier – but there is the legal possibility to cooperate in other activities which are in an operational permit of other healthcare service provider. The collaborate contracts are very common, especially in connection with inspection activities, and they are used in connection with specialist consultations too, so it is important to mention them⁵⁶. The collaborate contract is a special mandate contract, both of its subjectives are healthcare service providers. The point is that the collaborator personally or with his medical employees gives medical service in the name of the other healthcare service provider and for the latter one's patient, secures the necessary objective and personal terms, and the other healthcare service provider pays for the service. It is important that the subject of the collaborate contract can be only a medical service to which both healthcare service providers have operational permit⁵⁷.

V. Final thoughts

The aim of my paper was to demonstrate the liability for tort of the healthcare service providers in Hungary, which legal relations define them, which liability rules are applied, which are the methods to avoid the liability.

First, we analyse the legal relation between the healthcare service provider and the patient. It can be said that it is fundamentally a private law contractual relation with public law elements. But the legislator has realized appropriately that the stricter form for the compensation of the damages caused by the breach of the contract, inspired by the business contracts isn't suitable for the liability of the healthcare service providers. With changing Section 244 of the Healthcare Act, the legislator has already referred to the rules on torts which are actionable *per se*, and doesn't refer to the rules on contractual liability from the Civil Code. It must be mentioned that the prior form of Section 244 of the Healthcare Act has ended discussion between jurisprudence and practice in connection with the qualification of the legal relation between healthcare service provider and the patient in 2010. If we accept the contractual feature of the legal relation, the regulation is logically oppositional, because it orders to apply the rules of the out of contract liability for damages to a contractual relation. It would be better and necessary if the legislator – taking advantage of the private legal codification – had regulated in the Civil Code the legal relation between the healthcare service provider and the patient as a substantive contract, or as a subtype of the contract of services⁵⁸. In this case the special rules of liability would be acceptable too.

⁵¹ Ptk. 3:95.

⁵² Ptk. 3:97. § (2).

⁵³ 96/2003 (VII. 15.) government decree 11. § (2).

⁵⁴ Varga A. Magánpraxis alapítása I. Med et Jur. 2013. № 1. P. 21.

⁵⁵ Ptk. 3:161.

⁵⁶ For example – according to the data from – in 2013 more than 7200 collaborate contracts were in force.

⁵⁷ Kőszegfalvi E. Hogyan köthetünk közreműködői szerződést? Kórház. 2003. № 10. P. 24.

⁵⁸ Jobbágyi G. Az orvos-beteg jogviszony az új Ptk.-ban. Polgári Jogi Kodifikáció. 2005. № 3. P. 17.

Szeghő Á. Az egészségügyi szolgáltatás nyújtásával összefüggésben okozott károkért való felelősség szabályainak változása napjainkban. URL: <http://jesz.ajk.elte.hu/szegho42.html>.

In point of the measure of the financial liability of the healthcare service providers the contract with the liability insurer is determinative important, its system of terms, so we dealt with them next. There are problems with financing the amounts of the compensations, because of the “vacating” of the compulsory professional liability insurance these amounts are mostly covered by the budget for the function of the healthcare service providers. In the beginning, the compulsory professional liability insurance was a legal institution which has given real legal protection, security for patients and providers too and has worked according to the legislator’s will. But the increase of the borders of the liability of the healthcare service providers has disrupted the compatibility between the providers and the insurance companies. Because of the closed character of the supplying part of the healthcare professional liability insurance market, the unilateral contracting obligation for the healthcare service providers, the lack of the regulation on determining minimum conditions of the healthcare liability insurance, the contractual conditions determined by the insurance companies „are vacating” the legal institution. Without real legal protection this legal institution is a fetter for service providers, and the financing of the amounts of the compensation isn’t solved yet.

Finally, we examined the legal possibilities which are usually used during medical activities. It can be said there are many variable possibilities. I dealt preferentially with the liability rules of the legal relations, which are important and actual because of the tendencies, concerning the liability for damages of the healthcare service providers and make this liability more malevolent, and because of the explanation which is getting harder. Because of the wider liability there is the possible chance that the damage amount, or its part can be avoided to the employees who do the medical activities. The measure of this depends on the legal form in which the medical activity is being done. Not only a person with qualification can be in legal relation with the healthcare service provider, but – in favour of complete the personal and objective resources – the healthcare service providers can make contracts with each other. This means collaborate contracts which are significant in the area of the medical services. The term of starting the services, the costs and the liability are mainly diverge from each other in the legal relations. This is beneficial because the qualified medical person can find the form which is the most sufficient for his priorities and possibilities. He can operate in contractual relation at a healthcare service provider, or independently, or – in the form of a joint enterprise – he can operate a healthcare service provider. But there is the disadvantage that the possibilities are hardly seen clearly because of the many legal relations and the fragmented regulation.

References:

1. Jobbágyi G. Az orvos-beteg jogviszony az új Ptk.-ban. *Polgári Jogi Kodifikáció*. 2005. № 3. P. 15–20.
2. Törő K. Felelősség az orvosi működésért – Orvosi műhiba. *Magyar Jog*. 1987. № 2. P. 136–145.
3. Havasi P. Összefoglaló jelentés az orvosi műhiba perek gyakorlatának áttekintéséről, különös tekintettel a nem vagyoni kártérítésre. Budapest, 2008. 200 p.
4. Hídvéginé Adorján L., Sáriné Simkó Á. Műhibák és kártérítési perek az egészségügyben. Budapest : Medicina Kiadó, 2013. 250 p.
5. Sándor J. Gyógyítás és ítékezés. Budapest : Medicina, 1997. 402 p.
6. Szeghő Á. A kezelési szerződés. *Acta Conventus de Iure Civili* / T. Papp (szerk.). Szeged : Lectum Kiadó, 2009. T. XI. P. 81–85.
7. Kovácsy Z., Dósa Á. A vállalkozó orvosok nagy kézikönyve. Budapest : Complex, 2011. 700 p.
8. Menyhárd A. Felelősség szerződésszegésért. *Polgári Jogi Kodifikáció*. 2001. № 3. P. 24–28.
9. Csécsy A. Előreláthatósági klauzula a szerződések jogában. *Debreceni Jogi Műhely*. 2009. № 1. URL: http://www.debrecenijogimuhely.hu/archivum/1_2009/ (letöltve: 05.12.2013).
10. Kereszty É. A helyi önkormányzatok és az egészségügyi szolgáltatók kapcsolata. *Magyar Közigazgatás*. 1999. № 11. P. 619–629.
11. Jobbágyi G., Fazekas J. Kötelmi jog. Budapest : Szent István Társulat, 2005. 380 p.
12. Gergely E., Péterffy É. A felelősségbiztosítás. Szolnok : Biztosítás Oktatási Intézet, 1998. 240 p.
13. Simon T. Kezelve-e a szakmai felelősségbiztosítás Strucc Malvin módjára? *Kórház*. 2005. № 10. P. 10–20.
14. Harmat G. Az orvosi felelősségbiztosítás kérdései és lehetséges válaszai. *Egészségügyi gazdasági szemle*. 2003. № 6. P. 35–42.
15. Dósa Á. Az orvos felelőssége a tájékoztatás elmulasztásáért. *Lege Artis Medicinae*. 2001. № 1. P. 15–20.
16. Nyílt közbeszerzést írt ki az állami egészségügyi ellátó központ 96 kórház biztosítására. URL: http://www.biztositasiszemle.hu/cikk/hazaihirek/nemeletbiztositas/nyilt_kozbeszerzest_irt_ki_az_allami_egeszsegugyi_ellato_kozpont_96_korhaz_biztositasa-ra.5772.html (letöltve: 26.03.2019).
17. Kovácsy Z. Az egészségügyi jog nagy kézikönyve. Budapest : Complex, 2009. 250 p.

18. Varga A. Magánpraxis alapítása II. *Med et Jur.* 2013. № 2. P. 16–20.
19. Rónai F. Az egyéni cég előnyei. URL: <http://www.gymskik.hu/download.php?id=2844> (letöltve: 23.03.2017).
20. Varga A. Magánpraxis alapítása I. *Med et Jur.* 2013. № 1. P. 20–30.
21. Kőszegfalvi E. Hogyan köthetünk közreműködői szerződést? *Kórház.* 2003. № 10. P. 22–31.
22. Szeghő Á. Az egészségügyi szolgáltatás nyújtásával összefüggésben okozott károkért való felelősség szabályainak változása napjainkban. URL: <http://jesz.ajk.elte.hu/szegho42.html> (letöltve: 06.04.2019).

Dr. Judit Zákány,
*PhD, Research fellow of the Civil Procedure Department
of the Faculty of Law
of the University of Debrecen*