

**“SHOULD I HAVE BEEN CARRIED FROM THE WOMB
TO THE GRAVE?”
THE JUDICIAL PRACTICE OF PECUNIARY DAMAGES
FOR BIRTH WITH GENETIC OR TERATOLOGICAL
HARM IN HUNGARY AND ITS POSSIBLE IMPACT ON
MEDICAL PRACTICE**

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The medical content of the concept of fetal genetic or teratological harm, or of a disorder incompatible with postnatal life, which is a legal condition of the right of self-determination to terminate pregnancy granted until the 20th/24th week of pregnancy or without time limitation in Hungary, is changing as medical science and diagnostics evolve. Medical bodies, legislature, and judiciary – as well as families – need to reflect on this fundamental issue of society. The article draws lessons and makes recommendations based on the results obtained in the investigation of the practice of the Supreme Court (now: Kúria) and Regional High

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Courts of Appeal in cases decided between 2015 and 2021. The compensation for damage to parents was granted either to the full cost of raising the child born with an unrecognized genetic or teratological defect or, conversely, merely the additional costs causally related to the nature-based harm were awarded. This survey of the entire body of domestic case law reveals the scope of damages to be paid and the types of wrongful conduct in the diagnosis, information, screening, targeted testing, licensing, or determination of likelihood of disorder. Contrary to its national scope, the article sheds light on correlations useful for the international audience of wrongful birth cases regarding the presumed effect of high compensation amounts on the possible increase in the medical availability of abortion indications.

Keywords: compensation for pecuniary damages; fetal diagnostics; genetic and teratological harm to the fetus; impacts of tort law jurisdiction on medical practice; medical negligence

I. INTRODUCTION

A. On Job's lament and the title

A painful exclamation of Job cries: "Why then did you bring me out of the womb? I wish I had died before any eye saw me. If only I had never come into being or had been carried straight from the womb to the grave!" (Book of Job 10, 18-19).

The main title paraphrases the vociferation of Job as a not less excruciating question which could vigorously be addressed by the child either to the parents or straight to mankind since, in the analyzed issues, the existence and life of the child born with a genetic or teratological disorder is legally interpreted as harm that can be compensated with money.¹ Job's dilemma between being and

[†] Sharing the pain of their loved ones and their hope in the resurrection as well, as a friend of His from afar, I would like to dedicate this work to the distinguished memory of Marko Petrak, Husband, Father of Two, and widely respected professor of Roman law, whom the Almighty God has called so painfully early to the Heavenly Home.

¹ Several articles and books explain both the misapplication or rather the unlawfulness of using the adjective "wrongful" alongside words such as "life", "birth", and "pregnancy", and the inappropriateness of the phrase "child as harm" as well as the Continental equivalents thereof, i.e., "*das Kind als Schaden*", "*la vita ingiusta*", "*le bébé prejudice*" etc. Oliphant suggests the use of "reproductive torts", which is a neutral legal concept having no such inherent dark meta-juristic connotation. See Oliphant, K., *Comparative Remarks*, in: Koziol, H.; Steininger, B.C. (eds.), *European Tort Law 2008*, Verl. Österreich, Vienna, 2009, p. 663; Dickens, B., *Wrongful birth*

non-being, which has been embodied many times in world literature, perhaps in the best-known Hamlet soliloquy, is still sadly relevant today.

B. Legislative impacts on the interaction between medical and court practice

The paper explores a presumed interaction between the medical and judicial practice of the topic indicated in the subtitle. The mutual impacts of the practices and experiences of courts and medical institutions on each other has not necessarily been positive, due to a lack of harmony between the legislative environment and the development of medicine. In fact, there is a serious self-contradiction in the situation since some segments of obstetric practice, based on the law aiming for the protection of fetal life, also indicate the termination of pregnancy in cases where the diagnosis of the fetal disorder is not clear for objective reasons, or even in cases of doubt, or in cases where genetic/teratological damage is not serious and/or the surgically correctable disorder is no longer medically incompatible with post-birth life.

According to Article 6 (3) of Act LXXIX of 1992 on the Protection of Fetal Life (hereinafter APFL), “pregnancy may be terminated up to 20 weeks – or 24 weeks if the diagnostic procedure is delayed – if the probability of genetic or teratological harm to the fetus reaches 50%”. This paragraph of the law was in line with the state of medical science at the time it was drafted, but two severe problems have emerged in connection with this provision.

On the one hand, the “50% probability of harm” formulation, which was perfectly justified from a medical point of view at the time, has become obsolete today due to advances in medical science and diagnostic technology.² Depending on the type of genetic or teratological harm, probability rates are nowadays diversified from essentially 1% to 99%³, compared to the “yes or no” content of

and life, wrongful death before birth, and wrongful law, in: McLean, S. (ed.), *Legal Issues in Human Reproduction*, Gower, Aldershot, 1989, pp. 80–112; Picker, E., *Schadensersatz für das unerwünschte Kind („Wrongful birth“)*. *Medizinischer Fortschritt als zivilisatorischer Rückschritt?*, *Archiv für die civilistische Praxis*, vol. 195, no. 6, 1995, pp. 483–547; Mason, J.K., *Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology*, *Edinburgh Law Journal*, vol. 6, no. 1, 2002, pp. 46–66; Salaschek, S., *Die „Kind als Schaden“-Rechtsprechung im Verhältnis zu den §§ 218 ff. StGB*, Springer, Berlin, 2018, 10 *passimque*.

² When APFL entered into force, this wording was appropriate in the case of certain hereditary defects and disorders linked to the sex of the fetus. Some of these disorders in male fetuses could not be diagnosed at that time, so the sex alone was the decisive factor (scil. the fetus was either a boy or a girl, i.e., 50%).

³ A 100% certitude of a medically relevant fact does not exist scientifically, or its existence can scientifically be questioned or contested.

the 50% rate of probability. The problem of percentage interpretation can also arise today as follows. Is it possible to form a cumulative, arithmetic average of the harms and developmental disorders associated with the same organ? For instance, around 60% of cardiac malformations can be diagnosed with a high probability, while 40% thereof are rarely detectable or even not diagnosable at all since, for example, highly advanced intrauterine diagnostic tools are not equally available everywhere. Based on these figures, can it be stated beyond doubt that the probability of a cardiac malformation is 50%? This approach is obviously wrong, because a percentage probability only makes logical sense if it is linked to the specific type or species of each disorder or harm, rather than to the human organ concerned thereby. Where no special problem exists is the field of harms that are more likely to be diagnosable or, conversely, much less likely to be diagnosable or not diagnosable at all, according to the state of science. In the former case, an incorrect or omitted diagnosis gives rise to liability, but in the latter case, an unsuccessful medical examination does not necessarily establish liability.

On the other hand, it is normatively inconsistent to support the right of maternal self-determination to terminate pregnancy up to 20 or 24 weeks, while the law does not narrow the concept of "genetic or teratological harm" by (at least) using the adjective "serious", the meaning of which is a matter of medical discretion or judgement. Article 6 (1) (b) of APFL stipulates the existence of the criterion of "medically probable serious disability or other impairment" as a condition for the right of self-determination even with a shorter time limit, while Article 6 (4) (b) makes the exercise of the right without time limitation conditional on "a disorder incompatible with the life of the fetus after birth". In addition, Article 185 (1) - (3) of Act CLIV of 1997 on Health Care (hereinafter AHC) makes the exercise of the right to selective feticide up to 20 or 24 weeks subject to the condition of "a developmental disorder resulting in a medically probable inability to live" or "an impairment that is compatible with life but causes a severe and incurable disability". Another prominent problem is the definition of "disorder incompatible with postnatal life" according to Article 6 (4) (b) of APFL in the context of abortion irrespective of the duration of pregnancy. In many cases, the disorder is no longer medically incompatible with life after childbirth, and disorders or malformations can frequently be surgically corrected almost perfectly or to a considerable extent. Yet, a failure to prevent births with these harms carries a high risk of a substantial fine, according to court practice. However, the risk of compensation for damage can be found to be influencing in relation to the importance of an abortion indication. In the

Perruche Case (France)⁴, statistics show, among other things, that the settlement of claims for damages has encouraged a not inconsiderable proportion of sonographers to advise on abortion in doubtful cases:

“Diagnosis and prognosis of fetal anomalies have become more difficult to expose than before for 40% of them. Written information as well as medical reports or explanation about ability and limits of ultrasound (US) have been improved, in content for 64% and in use for 42%. Some clinicians (24.1%) report to take into account emotions of the parents-to-be more often. The duration of the ultrasound examination has increased for 27.8% of the sonologists. The opinion of a fetal medicine unit is requested more often for 51.9% of them. 20.4% report more indications for karyotyping, 7.4% of them believe that their counselling lead more often to termination of pregnancy. The majority feel that they discuss more about their difficult cases.”⁵

C. Briefly on the Hungarian legal environment

The Hungarian regulation of the law concerning compensation for parents' pecuniary damage emerging in a causal link with prenatal diagnostic errors by the health care provider is based on a bipedal scheme of the law of liability as it is given in many countries of both European continental and Anglo-Saxon legal systems. In Hungary, too, on the one hand, there is a system of liability for non-contractual damages (tort law or delictual law); on the other hand, there is a system of liability for contractual damages.

The Old Hungarian Civil Code (hereinafter OHCC; Act IV of 1959, in effect from 1 May 1960 to 14 March 2014) did not distinguish (or rather only in minor matters) between the two areas, because the so-called *bridge rule* – i.e., Article 318 (1) of OHCC provided that liability for breach of contract and the amount of damages shall be governed by the provisions applicable to liability in tort, except that damages may not be reduced unless otherwise provided by law. Under the effect of the OHCC, Article 244 of AHC ordered: “The civil law

⁴ *Cour de cassation* 17 November 2000 (JCP 2000, II, 10438). See more recently Feuillet, B., *The Perruche Case and French medical liability*, *Drexel Law Review*, vol. 4, 2011, pp. 139–149; Manaouil, C.; Gignon, M.; Jarde, O., *10 Years of Controversy, Twists and Turns in the Perruche Wrongful Life Claim: Compensation for Children Born with a Disability in France*, *Medicine and law*, vol. 31, no. 4, 2012, pp. 661–669; Borghetti, J.-S., *Liability for Not Preventing Harm in France*, *Journal of European Tort Law*, vol. 12, no. 1, 2021, pp. 146–161.

⁵ See Léticée, N.; Moutard, M.-L.; Ville, Y., *Changes in prenatal diagnosis and fetal medicine after the Perruche case and the law passed on the 4th of March 2002 in France*, *Ultrasound in Obstetrics and Gynecology*, P03.20, 2005, p. 393.

rules on liability for damages caused by breach of contract shall apply *mutatis mutandis* to claims for damages arising in connection with health services." Therefore, due to the aforementioned "bridge rule" of the OHCC, the exculpation (exemption) rule of delictual liability of Article 339 (1) of OHCC was applied in these cases, too, according to which: "A person who causes damage to another person in violation of the law shall be liable for such damage. This person shall be relieved of liability if he/she/it is able to prove that *he/she/it has acted in a way that can generally be expected in the given situation.*" The italicized formula of the rule should be interpreted as meaning that the damaging conduct, which was unlawful *per se* in view of the damage it caused, nevertheless met the general social expectation in the given situation or circumstances. It is also a *general* principle that applies in all civil law relationships, irrespective of whether there has been a tort or delict. In fact, Article 4 (4) of OHCC says: "If this law does not impose a stricter requirement, civil law relations must be conducted *in the way that is generally expected in the given situation.*" This regulatory environment prevailed in all litigation where the health care provider's damaging conduct or the damage itself occurred before 14 March 2014. Some of the lawsuits under the OHCC have been finally concluded only in 2020, and there may be some pending cases before the Curia or a Regional High Court of Appeal (RHCA) until today as well.

The New Hungarian Civil Code (hereinafter NHCC; Act V of 2013, in effect from 15 March 2014) has clearly divided the twofold approaches of delictual and contractual liability, the exemption clauses of which have therefore become paradigmatically different. However, the legislator has modified the mentioned section of AHC so that its new Article 244 (1) thereof, regarding pecuniary damages, says: "The rules of the Civil Code on liability for *non-contractual* damages shall apply *mutatis mutandis* to claims arising in connection with health services." Accordingly, the system of liability for damages caused by breach of contract does not need to be dealt with here, even though health services are based on a contractual relationship between the patient and the provider – which is, in the case of insurance-based services, triangular. The regulation of the exemption clause of delictual liability is found in Article 6:519 and Article 1:4 (1) of the NHCC. Article 6:519 says: "A person causing unlawfully damage to another shall compensate for the damage caused. The person causing damage shall be exempted from liability if he/she/it proves that *he/she/it was not at fault.*" The new italicized formula is not new at all, since Article 1:4 (1) of NHCC defines "fault" as the breach of the requirements of the "*Principle of generally expected standard of conduct*", which says: "Unless otherwise provided in this Act, in civil law relations, one shall proceed with *the care that is generally expected under the*

given circumstances.” The interpretation of the italicized formula of exemption of delictual liability has remained, therefore, the same. This regulatory environment prevails in all litigation where the health care provider’s damaging conduct or the damage itself occurred on or after 15 March 2014. Such lawsuits were initiated from the beginning of the period under review (in and after 2015, see chapter III, *infra*), many of them have already been concluded, albeit a good number are still pending.

The specific legal expectation towards health care providers is defined by Article 77 (3) of AHC, which says: “All patients, regardless of the reason for seeking care, must be treated with the care expected of those involved in their care *as well as* in accordance with professional and ethical rules and guidelines.” Based on the italicized segment of the cited text, judicial practice has affirmed that the expected diligence of doctors and others participating in health care may exceed the mandatory standards as well as the non-mandatory recommendations governing the medical sector in question.⁶ At the same time, it is also confirmed by courts that the person who caused the damage does not have to exempt from liability for all the omissions or errors that occurred but only for those ones that were causally linked to the damage.⁷

Wherever I use the phrase “*culpable* conduct / omission *etc.*” or “*failure / error*” or “being *at fault*”, it is to be interpreted as meaning that the conduct in question breaches the requirements of the general principle of expected behavior both in general (Article 4 (4) of OHCC / Article 1:4 (1) of NHCC) and in particular, i.e., in case of a health care provider (Article 77 (3) of AHC). If this behavior at fault causes damage, Article 339 (1) of OHCC / Article 6:519 of NHCC applies through the rule of reference in Article 244 (3) of AHC.

⁶ A decision of principle of the former Supreme Court, the legal successor of which, from 2012 on, is called the “*Kúria*” (hereinafter spelled as “*Curia*”, i.e., the court of supreme instance), No. EBH2010. 2229 says: “A hospital may be held liable for damages if its doctor, while complying with professional rules, fails to take measures or to inform the mother of the possibility of continuing with prenatal care and of detecting Down syndrome.” Another published decision (No. BH2013. 150) says: “The requirement of due diligence under the Health Care Act also extends to the need for the hospital to organize its medical activities in such a way that the performance of each task does not impede the other and does not result in delays in patient care. The defendant hospital is also liable for shortcomings in the organization of the activities, if they were causally linked to the injury.”

⁷ See published Curia decision No. BH2017. 16. See also decision No. BH2015. 225, which says: “With regard to a claim for damages for a mother who has died because of an atonic hemorrhage, there is no general requirement that the doctor who conducted the delivery must be exempted even in the case of a result outside the scope of causation.”

II. SCOPE AND GOALS

The study focuses on the Hungarian domestic issues related to the compensation for parents' pecuniary damage. It examines, therefore, neither the claims of children (*wrongful life* cases)⁸, nor *comparative* legal issues⁹ of wrongful birth and life cases, nor the development of parents' claims for *non-pecuniary* damages.¹⁰

The reason for this limitation of scope lies in two facts. Firstly, there is a difference in the magnitude of the amount of the granted compensations for pecuniary damages to parents (such fluctuations cannot be detected in the case

⁸ Article 25(3) of the Fundamental Law of Hungary provides that the Curia ensures the uniformity of the application of law by courts and makes, therefore, uniformity decisions binding on courts. In the light of this, the question of wrongful life lawsuits is settled, since Uniformity Decision No. 1/2008 stated that "a child born with a disability as a result of a genetic or teratological harm cannot, in his or her own right, claim damages under civil law from a health care provider because the mother was unable to exercise her legal right to terminate the pregnancy due to the absence of or incorrect medical information during prenatal care."

⁹ See *supra* note 1. Further: Bagińska, E., *Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation*, *Journal of European Tort Law*, vol. 1, no. 2, 2010, pp. 171–203; Hogg, M., *Damages for Pecuniary Loss in Cases of Wrongful Birth*, *Journal of European Tort Law*, vol. 1, no. 2, 2010, pp. 156–170; Ruda, A., 'I Didn't Ask to Be Born': *Wrongful Life from a Comparative Perspective*, *Journal of European Tort Law*, vol. 1, no. 2, 2010, pp. 204–241; Steininger, B.C., *Wrongful Birth and Wrongful Life: Basic Questions*, *Journal of European Tort Law*, vol. 1, no. 2, 2010, pp. 125–155; Keirse, A.; Schaub, M., *Self-Determination with a Price Tag. The Legal and Financial Consequences of Wrongful Conception and Wrongful Birth and the Decision of the Parents to Keep the Child*, *Journal of European Tort Law*, vol. 1, no. 3, 2010, pp. 243–265; Sheldon, S., *Only Skin Deep. The Harm of Being Born a Different Colour to One's Parents*, *Medical Law Review*, vol. 19, no. 4, 2011, pp. 657–668; Smrynaki, E., *Wrongful Life and Birth*, *Medicine and Law*, vol. 31, no. 1, 2012, pp. 97–118; Soritsa, D.; Lahe, J., *The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life; An Estonian Perspective*, *European Journal of Health Law*, vol. 21, no. 2, 2014, pp. 141–160; Raposo, V.L., *Wrongful Birth and Wrongful Life Actions (The Experience in Portugal as a Continental Civil Law Country)*, *Italian Law Journal*, vol. 3, no. 2, 2017, pp. 421–450.

¹⁰ Article 2:52 (1) of NHCC says that any person whose personality rights have been violated may claim a compensation for non-pecuniary harm done to him or her. Article 2:52 (3) says that the court shall determine the amount of the smart money in one sum, taking into account the circumstances of the case, in particular the gravity of the violation, whether it was committed on one or more occasions, the degree of fault, and the impact of the violation on the aggrieved party and his or her environment.

of non-pecuniary compensations), depending on whether the court judged the *full* cost of bringing up the child or merely the *additional* costs thereof. Considering this, the timeliness of the issue, as explained in detail in Chapter VI below, is the deciding factor.

Another reason for the limitation of scope is that the amount of pecuniary damages seems to be a criterion emerging in judicial practice that can have a non-negligible impact on medical practice regarding abortion proposals in *doubtful* cases for avoiding or minimizing the risks of an extensive compensation for damages. Empirical-statistical research among sonographers and obstetricians on the question of the impact of this kind has not yet been carried out, but the mere possibility of such an unfortunate effect, which, by nature, cannot be excluded *in toto* in advance, seems logical and self-evident. In my view, this presumably low proportion of possibility is enough not to ignore the issue. In addition, the importance of this question is increased by the fact that the rate of healthy fetuses following abortions legally performed after ultrasound diagnosis of harm is approx. 3%.¹¹ The number of permitted clinical or in-hospital abortions per year between 2015 and 2020, according to the Central Statistical Office of Hungary, has been on a downward trend moving from ca. 31,000 to ca. 24,000 (see below). Using the average of these extremes, i.e., approx. 27,500, the number of healthy fetuses aborted per year is about 825 (in these cases the abortion was based on a pre-natal diagnosis of harm subsequently proven by post-abortion pathology to be partially or totally false). The comparable statistical number of minor postnatal malformations which are successfully or almost perfectly correctable by surgery is not known.¹²

Other cases of lawful and permissible abortions that cannot be linked to similar damage compensation issues are not addressed in the study. These are as follows:

- before the 12th week¹³ in case of serious danger to health or in a severe crisis¹⁴ of the gravida, or if the fetus is medically likely to suffer from a serious disability or other impairment, or if the pregnancy is the result of a criminal offence,
- before the 18th week¹⁵ under the conditions set out in the previous paragraph, if the pregnant woman is of limited capacity or incapacitated,

¹¹ I am thankful for this data to Prof. Béla Veszprémi.

¹² I must express my gratitude to Prof. Béla Veszprémi again for sharing this data with me.

¹³ The enumerated preconditions see in Article 6 (1) of APFL.

¹⁴ See Article 5 (1) of APFL. Cf. Article 5 (2) of APFL, according to which a severe crisis is one that causes physical or psychological devastation or social inability.

¹⁵ See the legal conditions in Article 6 (2) of APFL.

or her pregnancy is not recognized earlier for a health reason or due to a medical error for which she is not responsible, or her pregnancy has exceeded the 12-week period due to the negligence of a health establishment or an authority,

- regardless of duration of pregnancy¹⁶ for health reasons endangering the life of the gravida, or in the case of the existence of a disorder in the fetus incompatible with post-natal life.

III. METHODOLOGY

The research methodology is summarized as follows. The source for the research on judicial practice was the anonymized decision database maintained by the National Office for the Judiciary, called the Collection of Court Decisions¹⁷ (hereinafter CCD). I used the words "fetus" and "disorder" (both obviously in Hungarian) as search keys for the search engine, because only this version of the search gave a nationally significant number (483 decisions) and spread (comprehensive, covering all courts) of results (as of 1 September 2021). As an additional limitation, I applied the following filters:

- I have chosen the year 2015 as the starting point. The reason for this lay in the fact that the "*Kúria*" (i.e., the court of supreme instance in Hungary, the legal successor of the former Supreme Court, hereinafter used in the latinized version "*Curia*") published its binding decision of principle No. EBH2015. P.11. (The new *limited system of judicial precedents* in Hungary, which makes every substantial decision of the Curia binding, is summarized below). Contrary to the previous controversial practice of the five "*Ítéltábla*" (i.e., Regional High Courts of Appeal, RHCA) and that of the Curia itself, the Curia, with this decision, has elevated it to a matter of principle that in the context of pecuniary damage, parents can claim the full costs of raising a child born with a misdiagnosed genetic or teratological harm, and there is no legal basis for separating the costs arising from raising a healthy child and that of a child born with such an undiagnosed harm. This filter narrowed the total search results of 483 decisions to 267 decisions between 2015 and 2021.
- The second filter was the indication of the field of law. The possible matches were selected from the field of civil law. Thus, I excluded criminal proceedings arising from similar facts and disputes concerning guardianship or other administrative matters. This filter reduced the

¹⁶ See Article 6 (4) of APFL.

¹⁷ See <https://eakta.birosag.hu/anonimizalt-hatarozatok>.

number of hits (267) to 238.

- As a third filter, I used the instance of court. I examined the decisions of courts that issue only substantive decisions that are immediately final¹⁸, such as the Curia and the 5 RHCAs. This filter reduced the number of decisions (238) to 135.

Following a thorough substantive examination of these decisions, almost half (64) of the selected number of 135 were found to be essential. The territorial representation of the 64 relevant decisions is as follows: Curia 24, RHCA of *Budapest* 16, RHCA of *Debrecen* 4, RHCA of *Győr* 9, RHCA of *Pécs* 9, RHCA of *Szeged* 2. This outcome regarding the proportion of relevant and irrelevant decisions confirms that the method of searching for decisions described above was probably appropriate and effective.

As a *control* of the research method, I gave the CCD's search engine simultaneously the words "raising", "cost" and "fetus" as search keys, which confirmed the correctness of the search parameters outlined above.

Finally, regarding the methodology and its control, it should also be stressed that the problem could only be examined with complete objectivity if the research covered all the decisions that became final at first instance and the disputes that were settled by agreement. The latter are not searchable for obvious reasons of privacy, and judgments that became final at first instance in the absence of an appeal are not searchable in the freely accessible CCD database.

IV. CONTRADICTORY COURT POSITIONS

Currently, there is a yet unresolved controversy in Hungarian judicial practice – both between the judicial panels of this specific field of the Curia and among the RHCAs' panels as well – as to which of the following approaches is the correct one.

As a preliminary point, it should be noted that the set of judgments under examination showed, as anticipated, that the concept of *upbringing* or *raising costs of a child*, both for an average healthy child and for a child born with a specific genetic or teratological disorder, is a *flexible* or *malleable legal term*, the content of which is defined by the court on a case-by-case basis according to its discretion in the context of the claim and the counterclaim.

¹⁸ This is because, due to the rules on jurisdiction and competence, these cases are usually brought before the "Törvényszék" (i.e., Tribunal) as court of first instance. The RHCAs therefore act as an appellate forum, and the decisions of the Tribunals are logically reflected in these judgments of appeal.

A. The Opinion supporting the grant of full upbringing costs

For the parents as injured parties, the *full* cost of bringing up their child born as a result of a pregnancy not terminated despite a genetic or teratological disorder of the fetus due to a diagnostic failure or a lack of information constitutes a loss for which civil liability for damages is fully capable of compensation. As Point II of the decision of principle of the Curia published in its official journal under No. EBH2015. P.11¹⁹ says:

“In the case of pecuniary damage, parents can claim the full cost of bringing up a child born with genetic or teratological harm. There is no legal basis for the separation of costs arising from health and disability.”

Although this position is now somewhat officially confirmed, it is not unanimously followed by the courts of lower instances²⁰ since there is no constitutional obligation to adhere to the merits of the decision in a case with identical facts (*scil.* only Uniformity Decisions of the Curia are directly binding on courts²¹). In fact, contrary decisions have been taken even within the Curia, both before²² and after²³ the published judgment of EBH2015. P.11. This is the currently *prevailing* but not generally accepted position.

B. The Opinion in favor of awarding merely additional upbringing costs

In such cases, the parents can only claim the costs of bringing up the child born as a result of a pregnancy not terminated despite a genetic or teratological disorder of the fetus due to a diagnostic failure or a lack of information that emerge as *additional* costs (not “collateral” ones) causally related to the disorder compared to the costs of raising an average healthy child. Further material disadvantages of the parents – i.e., full upbringing costs minus the additional ones – are partly borne by themselves and partly covered by social security. This

¹⁹ The file number of the case was: Pfv.III.20.069/2015. The court case numbers are given below only in exceptional cases, because a non-native Hungarian reader would not be able to check the decisions published in Hungarian without knowledge of the language.

²⁰ See, e.g., before the Tribunal of Pécs, Case No. 15.P.28.698/2018.

²¹ See Article 25(3) of the Fundamental Law of Hungary *supra* note 8.

²² See Case No. Pfv.III.20.870/2012 and Pfv.III.20.800/2013.

²³ See Case No. Pfv.III.21.750/2015.

opinion, which can be considered a *minority* view, appeared *much earlier* than the dominant position summarized above. In 2006, the Civil Law Division of the RHCA of Pécs adopted an Opinion proposed by the court's then President, an eminent scholar, *Tamás Lábady* (1944–2017), which had become the prevailing opinion for about a decade in the country. Namely, Point III of Opinion No. 1/2006 (VI. 2.) stated that

“In the case of a child born with an inherent disorder, if the conditions for liability and compensation are otherwise met, the amount of compensation for pecuniary damage shall be determined by the additional costs of the difference between the maintenance, care and upbringing of the disabled child and the healthy child.”

In the light of the above Curia-decision No. EBH2015. P.11., and to improve the unity of judicial practice, the Civil Law Division of RHCA of Pécs adopted a newer Opinion No. 1/2019 (VI. 5.), according to which it no longer upholds its previous Opinion of 2006.

V. SENSITIVE PRELIMINARY ISSUES

Considering that one of the most difficult situations in human existence is to be measured by the Scales of Lady Justice, and that judicial sympathy cannot be excluded as a factor influencing the judgment, some preliminary issues must also be nailed down. The emphasis must fall on the fact that a child born with a genetic or teratological disorder had no chance of a healthy life, and the only alternative of the child's disabled life was non-existence.

- On the one hand, the tragedy of parents expecting individual, communal, social acceptance, support and understanding for the extreme hardship they have suffered in their lives, is not changed *in its substance* by a successful action with a full claim for financial compensation. On the other hand, there is a profound question as to whether the judicial system should deprive parents – e.g., on the aforementioned grounds vested in or merely masqueraded as law based reasonings – of the financial support stemming from the material compensation of the *full* upbringing costs, which can make their sometimes extremely difficult lives easier. In any case, the other pan of the scale shows another considerable factor. State health care organizations are not well funded and not well insured by insurance companies regarding these huge amounts

to be paid as monetary compensation of the full raising costs. Ultimately, the state has a constitutional and a civil-law-based duty to meet its institutions' obligations, but the question is how much the health care institutions' shrinking budget will exacerbate the problem aimed to be avoided. These seem to me deep professional and human dilemmas.

- Or is the raising of these questions merely a side issue, a dramatic device this time? The evidence from some of the lawsuits suggests that this is even possible. In some cases, namely, the almost limitless self-sacrifice of the parents, which may otherwise exhaust their own life energy, and deplete their relationship, can result in an improvement in the quality of life of the child that is a testimony to the very transcendent love that completely precludes the raising of such questions. In such trials, the court always sets aside the respondent's defense, which refers to the clearly visible conflict between the plaintiffs' (i.e., parents') statement of claim for compensation of damage suffered by the birth of their child and their self-sacrificing lifestyle. The reasoning of the courts is quite similar when stating:

"There are two totally different situations in life: The one is when a parent must decide during pregnancy whether to have or not to have a severely disabled child, and the other is when the parent has already faced this dramatic situation, has developed a warm bond with the child, and then he or she must stand by the diseased child with a sense of parental love and affection."²⁴

VI. NEW WAVES IN THE COURTS: DISHARMONY PERSISTS

A. Preliminary overview

In the spring of 2021, a new trend has begun to emerge in the thinking of the courts that could move judicial practice towards unity: At present, however, it is still questionable in which direction of unity, since, as mentioned, the Curia has published contradictory decisions delivered in analogous cases in the CCD.²⁵ Every decision was delivered and uploaded to the database of CCD after 1 January 2012, and this fact still allows lower courts (RHCA and Tribu-

²⁴ See paragraph [46] of the grounds of judgment of RHCA of Pécs in Case No. Pf.VI.20.028/2020, where "Pf." indicates that the case is a civil appeal case, and "VI." shows the number of the judicial panel deciding the case.

²⁵ Cf. *supra* notes 22 *sq.*

nals) to follow a contrary practice. Namely, the newly implemented Hungarian regulation on a *limited system of judicial precedents* based on the so-called *uniformity complaint* in paragraphs (1) - (2) of Article 41/B of Act CLXI of 2011 on the Organization and Administration of the Courts says:

“§ (1) A uniformity complaint may be filed against a Curia decision where no further challenge lies in the form of appeal, application for review or motion for review, where any deviation in questions of law from a Curia decision delivered after 1 January 2012 and published in the CCD has already been alleged, and the Curia failed to remedy the infringement resulting from the deviation in its decision.”

“§ (2) A uniformity complaint may be filed also if the adjudication chamber of the Curia deviates in a question of law from the published Curia decision – without initiating the unification procedure – knowing that such deviation had not been applied in the decision of the lower courts.”

In view of the legal and factual background outlined above, neither the adoption of theoretical opinions nor the delivery of judgments contrary to the published decision of the Curia No. EBH2015. P.11. can be ruled out.

B. The new 2021 Opinion of RHCA of Szeged

On 15 April 2021, the Civil Law Division of the RHCA of Szeged adopted a majority opinion, according to which:

“In relation to the upbringing of a child born with a developmental disorder, parents can claim as pecuniary damage the difference between the higher raising costs of the disabled child and the lower costs of the planned healthy child.”

Besides, the unanimous opinion of the Division was that a unification procedure is justified on this issue. A unification procedure ends in a uniformity decision which is binding on courts under Article 25 (3) of the Fundamental Law of Hungary. The opinion contains many important arguments, some of which have not been given sufficient emphasis in the debate on the subject so far²⁶:

²⁶ The bulleted presentations here and below are my own summaries, not quotes.

- It is the duty of courts to develop a uniform practice that is reassuring and predictable for citizens who bring claims for damages against a health care provider for the birth of a disabled child, and which is free of such blatant anomalies now existing.
- In the case of wrongful birth claims, the mother's right of self-determination is violated because she could not decide on the termination of her pregnancy according to Article 6 (1) (b) of the APFL due to the health care provider's culpable conduct. The harm of the mother's right to self-determination is the intermediate cause of the infringement of the right to family planning of both parents. Compensation must therefore be linked to the infringement of the right to family planning.
- In deciding whether the defendant is liable for the child's full upbringing costs or only for the additional costs of upbringing, the concept of the right that was infringed, i.e., the right to family planning, is the basis for compensation.
- The meaning of the term 'family planning' is that under this right, prospective parents plan to have children who are healthy for the family to thrive, and therefore the violation of the right to family planning consists in the deviation from the planned family due to the fault of the health care provider. The starting point for calculation of damages is therefore the cost of raising a healthy child.
- The right to life and human dignity are inviolable, so those born with health problems also have an inviolable right to life and human dignity. On this basis, no legal distinction can be made between the value of human lives – says the Decision of the Constitutional Court of Hungary No. 64/1991 (XII. 17.). The court must also consider a child born disabled in the same way. An interpretation of the rights to family planning and self-determination that, by the disadvantage caused by the violation thereof, treats the mere existence of another person as a "harm", as granting of the full cost of raising the child would imply, is in no way justifiable.
- In the application of the legal consequences as to legal protection, those moral restraints must also be manifested and made into the objective that does not prefer the non-existence of the child to its existence.
- Article 6:521 of NHCC says: "No causal link shall be established in connection with any damage which the person causing it could not foresee and should not have foreseen." The question is whether the court could qualify the full cost of raising a child as a foreseeable damage

at the time of the medical negligence, knowing that the parents were planning a family and wanted a healthy child.

- On a comparative basis, it is not acceptable that parents should be compensated to a much greater extent for a violation of their right to self-determination or family planning than when an otherwise healthy fetus is damaged by a medical treatment error and is therefore born disabled. Following the same approach of comparative view, the anomaly must also be avoided that the parents of children who are less disabled by nature should receive the same full upbringing costs as parents of severely damaged children. The definition of severe disability/disorder is defined neither by the APFL nor in any other legislation, although the differences between the various disorders are obvious to laymen as well, and therefore the role of the court's discretion is enhanced, which increases the risk of divergent judicial practice. Justice is an equal weighting of legal situations, which cannot be isolated. A judicial decision is only just if it can be compared with other cases, if it does not contradict them, and if the legal consequences applied are not disproportionate. This is what society expects from the law and the courts.

C. The Response of the *Curia* in 2021

The very judicial panel of the *Curia*, which delivered the decision forming the core issue of the actual problem (EBH2015 P.11.), adopted a position on the Szeged proposal. The contradictory opinion of the justices seems to support the emerging new trend and the need to shift the *status quo*. The only consensus among the members of the *Curia* panel was that a uniform procedure is inevitable to achieve legal certainty across all courts. In view of the new limited system of precedents, it is indispensable to settle the issue by a binding uniform decision of the *Curia*, because there are conflicting *Curia* decisions on this subject, so a deviation from one of them will necessarily occur.

On substantive issues, however, the opinion of the *Curia* panel's members has remained divided. A common starting point was that the tortfeasor is only liable to pay damages for what is covered by the concept of damage. The disadvantage, the damage, is determined on the basis of a more favorable situation before the damage occurred. By comparing this with the situation after the event, the judge can take a position on what is considered damage. In this peculiar situation, the child born with a genetic or teratological disorder had by nature no chance of a healthy life. The only alternative for the disabled life was not to be born. The difference of positions is also attributable to this specific

circumstance, which has already been clearly pointed out in the Uniformity Decision No. 1/2008 of the Supreme Court (i.e., the legal predecessor of the Curia) on exclusion of wrongful *life* claims, the acceptance of which would have led to the interpretation of disabled life as a loss or damage.²⁷

The question has emerged and remained unanswered whether this incontestable point of view is binding on courts with respect to wrongful *birth* cases as well:

- According to the *negative* opinion, which is consistent with the position expressed in EBH2015. P.11., this interpretation does not follow from the reasoning of the Uniformity Decision No. 1/2008 of the Supreme Court. Therefore, there is no obstacle to the grant of full child-raising costs since the court, by this decision, does not consider the existence of the disabled person as civil damage. The court adjusts the amount of compensation to the violation of the right to self-determination and family planning, the infringement of which cannot be divided, and, for this reason, the compensation for damage incurred by the indivisible violation of these rights cannot be separated to basic and additional upbringing costs either.
- According to the *affirmative* position, which is contrary to the published decision No. EBH2015. P.11., since the non-existence of a disabled child cannot be interpreted as a more favorable condition than the existence thereof, the costs arising from the child's existence cannot be included in the definition of damages from the parents' point of view. In other words, basic or general upbringing costs of an average healthy child are not actionable, therefore the parents may sue only for the additional costs incurred in connection with the nature-based disorder of the child.

D. The response of the RHCA of *Budapest*

The responses of the RHCA of Budapest to the Szeged proposal supported by the majority, are not uniform either.

- According to the comment partially following the EBH2015. P.11. decision of the Curia, the claim of parents of children born with a disorder depends essentially on the severity thereof. The courts shall consider every specificity of each case when deciding whether parents can claim compensation of the full cost of upbringing. Such claims are mostly made by parents who have a severely disabled child. The Curia also

²⁷ See *supra* note 8.

gave guidance on this case in its decision of principle. The mental and physical development of a multiply impaired child is severely retarded, and a child with such a high degree of disorder often has little or no developmental capacity and is dependent on others for his or her lifelong subsistence, with care and maintenance provided by his or her parents. Therefore, it is almost impossible to talk conceptually about “upbringing” costs, as the life of the child cannot be compared to the life of a healthy, developing child. When a child is born with a minor impairment and has no other physical or mental impairments apart from this mild disability, his or her development can be age-appropriate and even independent. The situation of parents of a child with a health problem can then be compared to that of parents of a child who is healthy. In such cases, additional costs must be considered when determining the amount of compensation for pecuniary damage.

- The other opinion fully follows the guiding decision of the Curia. The position is that the primary violation of personality, contrary to the Szegeged proposal, is the violation of the mother’s right to self-determination. Without this, the violation of the father’s or parents’ right to family planning is out of the question. The acceptance of the Szegeged position would empty the mother’s right of self-determination and fictitiously question her decision-making power *ex post facto*. The court cannot, in accordance with the Official Motives of APFL, make an exhaustive list of the conditions for the right of self-determination for abortion. Therefore, following Article 6 (3) of APFL, if the developmental disorder is considered a genetic or teratological disorder and the probability of its occurrence is 50% or more, it is not possible to assess whether the abnormality is incompatible with life or whether it is likely to be correctable after birth. In the current legislative environment, i.e., according to the mentioned article which contains no adjective for qualifying the genetic or teratological disorder, no distinction can be made between harms according to their severity. Therefore, in line with the opinion of the Curia, the focus of the damage is not on the fact of birth, but on the life of the mother deprived of her freedom of choice and of the parents with a heavy burden. The response questioned the extent to which it would serve the rights of the injured child to have his or her parents receive significantly less pecuniary compensation. The response says that it is not contrary to the general moral standards of society if the same degree of health impairment justifies different levels of financial compensation in the case of a violation of the right to self-determination and family planning and in case of a medical treatment error.

E. The response of the RHCA of *Debrecen*

The response of the Head of Civil Law Division of RHCA of Debrecen faithfully following EBH2015. P.11. decision of the Curia emphasized that the infringement of the right to self-determination and family planning cannot result in anything other than an award of the full costs of raising the child. If the mother or the parents accept the financial and very serious mental and emotional burden of raising the disabled child, it is a matter of the mother's independent or the parents' joint decision, which the court cannot take away from them on the grounds of fetal protection. The court must resolve the dispute, not decide in the plaintiff's life, by taking over the exercise of the right to self-determination and family planning during the judgment's reasoning on the compensation for the additional child-raising costs.

The court can only consider whether the parents have been given all the relevant information to make their decision on having or not having the baby. Article 6:522 (1) of NHCC defines the *general tort law principle of full compensation*: "The person causing damage shall compensate the injured party for his/her *entire* damage." Based on this principle, the injured party should be put in a position as if the injury had not occurred, not because of the birth of the child, but because of the violation of the right to terminate the pregnancy. In this case, a healthy child could not have been born, so the basis of comparison cannot be an unfeasible life situation, and since the doctor bears no responsibility for the disorder, the additional costs associated with the disability cannot be based on anything other than the failure to exercise the right of self-determination.

F. *Causa finita?* Until then?

"*Roma locuta, causa finita*", i.e., "Rome has spoken, the cause is finished" says the Latin adage derived from a statement stemming from a sermon of Augustine on the fact that Pope Innocent I had ratified the condemnations of the Pelagian heresy pronounced at the councils of Milevi and Carthage early in the fifth century. Augustine said (*Sermon* 131:10²⁸): "The two councils sent their decrees to the Apostolic See and the decrees quickly came back. The cause is finished; would that the error were as quickly finished."

²⁸ "*Iam de hac causa duo consilia missa sunt ad sedem apostolicam; inde etiam rescripta venerunt; causa finita est, utinam aliquando finiatur error.*"

It can be concluded that our cause has not yet been finished. Namely, the wished uniformity decision of the Curia, which would be binding constitutionally on courts, has not yet been declared. It is to be hoped that, once the debate has been concluded in this way, there will be no need to echo the words of Augustine: “*causa finita est, utinam aliquando finiatur error*”, i.e., both cause and error will be finished by the Curia’s uniformity decision.

The uniformity procedure will be inevitable due to the pending cases on similar subjects before the Curia as its Review Panel in an individual case will necessarily deviate from one of the contradictory decisions published. A comprehensive analysis of the Hungarian national judicial practice following the method depicted above cannot be omitted until the uniformity decision is made, because its results provide serious lessons not only for the Hungarian courts and the societies of sonographers, obstetricians, gynecologists, and clinical geneticists but also for a wider international audience of such interests.

VII. JUDICIAL PRACTICE AFTER 2015

A. Preliminary remarks

I follow the threefold aspect below during the summary of the trends in lawsuits brought by parents against a health care provider when their child is born with a genetic, teratological or life-threatening disorder and the tests carried out during prenatal care have failed to detect the disorder in question due to the health care provider’s negligence, and therefore the pregnancy was not terminated. I have analyzed 40 RHCA-judgments and 24 Curia-decisions in the period 2015-2021, and trends can be discussed according to the following considerations:

- the geographical and regional distribution of the cases (case file data in the notes),
- the facts of the cases to classify the health care providers’ wrongful conducts (in VII.B),
- the outcome of the case in terms of full or additional upbringing costs (in VII.C).

It should be noted that in the most recent cases, the case may have reached only an interlocutory judgment on the establishment of tort liability, and the proceedings are still pending at first or second instance as regards the decision on the amount of damages. There are also cases where the grounds of the final judgment on the question of damages do not reveal the exact factual basis of

liability, since it was the subject of an interlocutory judgment in the proceedings, which was sometimes no longer available (due to a lack of publication) and is not repeated in the accessible decision closing the proceedings. Even so, cases with partial but useful data as to the facts of the culpable omission or as to the extent of the granted damage are still referred to in the text or in the notes.

In some cases, an overlap emerges between the different types of culpable misconducts, i.e., the same case can be cited for more than one type of omission or failure. This is because either the causal link between the health provider's conduct and its damaging result is sometimes longer or the culpable omissions may even multiply when they are built on each other. For example, a simple medical report failure or a diagnostic error is followed by an information failure, which leads to the omission of a screening test that would have provided the basis for a necessary targeted screening.²⁹

B. Classification of the health care provider's misconducts

Based on the facts of the cases, the following types of medical misconducts and omissions could be identified as *errors in medical reports*, in *information*, in *screening tests*, in *targeted tests*, in the *medical examiner's licenses*, and *errors in measuring the likelihood of existence and detectability of disorder*.

1. Errors in medical reports

Typical problems in relation to culpable breaches of the obligations regarding medical reports include: (a) the irregular correction in the text both of anamnesis and diagnosis³⁰, (b) the use of abbreviated, panel-like texts, as recommended by the professional medical societies, for the absence of a negative

²⁹ It is worth adding the following data series for the years 2015-2020 from the national population-movement statistics of the Hungarian Central Statistical Office: (1) Live Birth 91,690 (2015) < 92,338 (2020); (2) Abortion 31,176 (2015) > 23,901 (2020); (3) Fetal Death 16,802 (2015) > 15,300 (2020). See https://www.ksh.hu/stadat_files/nep/hu/nep0001.html (accessed Apr. 20, 2022).

³⁰ After a Chorionic Villus Sampling (CVS): "paracentric translocation" of chromosome 4 subsequently corrected to "pericentric inversion" by unknown person. The causal link here is complex: defendant did not act with due diligence in taking and documenting family and individual medical history → inappropriate diagnosis was not raised → no reason for further targeted testing was apparent → targeted testing was not performed in a timely manner → chance of timely detection of genetic disorder was lost. Detailed see *infra* note 63.

test result³¹, (c) not fully explaining the details of a negative finding during the screening (no mention ≠ no anomaly!).³²

Another typical problem emerges during the defendants' reasonings in lawsuits that (d) the courts hold insufficient to record the findings of screening at such a level that, in the absence of concrete data, it can retrospectively only be concluded that the examination of an organ plane visited during the ultrasound diagnostics of another organ took place quasi necessarily as it was "en route". In lack of concrete data of the outcomes of a testing, the assumption that the examination of an organ must have taken place "necessarily" or "logically" during another organ's examination actually recorded, has no force of evidence.³³

The cases above are not primarily problematic because of the risk of losing the possibility of a successful evidencing procedure on the side of the defendant, but such an outcome of a situation may prevent proper care of the gravida and fetus during the prenatal period's culpable diagnostic failures probably based on the medical report's errors.

The following cases also belong to the medical report errors, i.e., (e) the incomplete recording of data in mandatory or recommended areas of screening tests (this may be associated with diagnostic omissions as well)³⁴ as well as the

³¹ For instance, the use of the term "skull intact" does not imply an explicit statement about relevant brain formations. In addition, the usual phrase "no gross discrepancy found during the professional protocol examination" is as such insufficient. The wording "no evidence of fetal malformation" or "according to the Hungarian Society of Obstetrics and Gynecology protocol" (hereinafter HSOG) is not suitable to prove the examination of the face and limbs according to the protocol in the absence of a specific detailed description. In the absence of a description of the fetal organs to be examined, it is insufficient to state that "no gross abnormality was observed during the examination carried out in accordance with the current professional protocol". In the latter case, the chain of causality by omission is also complex: deficiencies of medical report → test error → information error.

³² See the cases in the previous note. In another case, the inversion of the thoracic and abdominal organs (*situs inversus totalis*) and *dextrocardia* were confirmed retrospectively, but, according to the medical report, sonographic screenings at weeks 12, 18, 29 and 36 were all negative, and it was merely stated "normal anatomy, no abnormalities". Here the diagnostic error is so serious that it is more likely to be a medical report problem. In the absence of recorded data, the defendant's defense is not accepted, according to which "the fact that the length of the femur and the diameter of the skull are included in the report implies that the face and limbs were examined in sufficient detail".

³³ See some Budapest, Pécs, and Debrecen RHCA cases' interlocutory, and partial judgments.

³⁴ It is not confirmed that a detailed review and examination of the fetus' spine and

omission to resolve discrepancies and contradictory issues within the report's textual parts or between the facts and the textual report thereof in case of (f) either a medical test³⁵, (g) or a family anamnesis³⁶, (h) or a basic data of the gestation such as e.g. gestational age.³⁷ The latter can lead either to the loss of a testing opportunity³⁸ and the many disadvantages thereof, or – *horribile dictu* – to an otherwise forbidden induction of miscarriage of a 27 weeks old fetus' thought to be in the age of 24 weeks, which resulted in an injured live birth.³⁹

Other cases of medical report errors include incomplete recording of the data of (i) the diagnostic device or (j) the level of authorization (license) of the examiner⁴⁰, and (k) the failure to record the pregnant woman's refusal to undergo an examination or intervention in accordance with the law or the facts, which may be based in part on a culpable breach of the duty to provide information, in part on the recording of information.⁴¹

skull was performed during the ultrasound test at week 23, at which time none of the biometric data were recorded despite the high AFP. In another case, at both week 12 and week 19 US test, the screening of the heart's four chambers, and that of the bilateral toe's sandal gap symptoms were missed as well as the humerus' scaling. In addition, head diameter (BPD) and femur (FL) measurements were also omitted at week 12, and nuchal fold thickness was not assessed at week 19. Another ruling showed that the ultrasound findings did not include the examination of the fetal nasal bone, the hypoplasia of which is associated with fetal chromosomal abnormalities.

³⁵ The defendant did not clarify the reason for the difference between the two AFP results (0.58 / 0.73). The Curia accepted the view of the RHCA of Győr that a targeted ultrasound examination after an AFP value of 0.58 is necessary to exclude abnormality, which is *within* the standard of care required by law, and, at the same time, *beyond* the requirements of professional protocol.

³⁶ This can result in liability even if the basis for the contradiction is traced back to an erroneous genetic test obtained by a third party 20 years earlier, but there is evidence that this error was suspected.

³⁷ See in the published decision of principle No. EBH2015. P.11. The facts of the case say that there was a meaningful discrepancy between the gestational age indicated in the Triple Marker Test (AFP, beta-hCG, uE3), and the gestational age established by the defendant, who could not exempt the liability for the contradiction.

³⁸ The defendant failed to have the AFP-test at the disorder risk tests due between 14-20 weeks and then failed to make up the test because of a pregnancy that was mistakenly believed to be advanced.

³⁹ See an RHCA of Budapest case.

⁴⁰ To (i)–(j) see a single case before the RHCA of Budapest.

⁴¹ See some RHCA of Budapest case.

2. Errors in information

The culpable failure to comply with the duty to provide information is typical in relation to the purpose, risks and benefits of examinations and interventions⁴², and the rights of parents and mother to examinations and care⁴³, as well as the rights to terminate pregnancy regulated by AHC and APFL. The latter, i.e., the failure to provide information on abortion rights, is a typical issue. Here shall be highlighted only those cases where the failure was not diagnostic in origin but was based on a medical contraindication to abortion⁴⁴ or was due to a failure to provide information despite the availability of an appropriate diagnosis.⁴⁵ In case of abortion contraindication, a typical failure to provide information prevents or impairs the exercise of the right to a professional review of contraindication.⁴⁶ The question of sufficiency of information arises as to the means of communication: “How far is the institution obliged to go in terms of simple contact by post, telegram, telephone, email, personal contact, *etc.*?”⁴⁷

⁴² Case (1) It is not satisfying to give information on the importance and risks of chromosome testing on a form, and it is not enough to inform the patient about the results of the triple test and the procedure to be followed by sending a letter by post. According to the court, it is essential to inform the patient orally and individually. Case (2) In offering targeted genetic testing based on the age of the mother and her AFP status, the defendant did not provide detailed information about intrauterine karyotyping, which the gravida did not wish to have. Case (3) The defendant did not offer the quadruple test (AFP, beta-hCG, uE3, inhibin-A) until 20th week of pregnancy.

⁴³ See previous note. The culpable failure to provide information about the nature of examinations and care, and the faulted omission to inform on the entitlements thereto are usually associated misconducts.

⁴⁴ Case (1) According to the defendant, the clubfoot is correctable after childbirth and does not in itself constitute an indication for termination of pregnancy. Case (2) The absence of the left upper limb distal to the elbow is not a ground for abortion.

⁴⁵ The mother's first child died in 2008 at the age of 14 days due to a cardiac malformation incompatible with life. In the case of the second child, the fetus was found to have the same disorder at 20 weeks of pregnancy in 2009, yet the plaintiffs were not informed of the possibility of terminating the pregnancy. This child died at the age of 21 months, having been in hospital all her life. The mother has developed a severe mental disorder due to grief.

⁴⁶ See *supra* note 44.

⁴⁷ Unsuccessful information about a confirmed Down syndrome has been provided by telephone and telegram. The latter was received late by the mother and the miscarriage of 27-week fetus was induced, and then a damaged, albeit viable, baby was born (additionally a false determination of gestational age also emerged, see *supra* note 39).

In the case of a positive test result and if further testing is warranted, a simple postal dispatch is not sufficient.⁴⁸ The information errors typically result from such lacks of data which were caused by an omitted examination and/or by a medical report error.⁴⁹

3. Errors in screening tests

Regarding screening tests, there are occasions when there is an inexcusable delay⁵⁰ or other omission⁵¹ in ordering the test⁵² or carrying it out. These include, in particular, lack of sufficient detail⁵³ or lack of detection (or of observation or perception), e.g., due to lack of expertise (or of competence)⁵⁴, or for other reasons that cannot be determined *ex post* even by experts.⁵⁵ There are also cases of ignoring relevant parental medical history⁵⁶, or of not taking into account the advanced age of the pregnant woman or the relevant – not necessarily high – age of the pregnant woman when evaluating the individual test results.⁵⁷

⁴⁸ A case before the RHCA of Pécs.

⁴⁹ In addition to two RHCA of Budapest trials see a mass of lawsuits in the same legal dispute from RHCA of Győr, in which the Curia with a different composition of justices repeatedly (!) took opposite positions regarding the adjudication of full and additional upbringing costs.

⁵⁰ In monochorionic twin pregnancies, the defendant performed the appropriate number of ultrasound screenings, but if it had performed the screening within 2-3 weeks of week 25 rather than at week 29, as per textbooks, there would have been a chance to diagnose and treat twin-to-twin transfusion syndrome (TTTS) and avoid brain damage.

⁵¹ See Case (1) of a non-recognition of a mild *sirenomelia* as a form of caudal regression syndrome: From week 12 onwards, the spine and the presence of ossification nuclei and kidneys should be examined. It is a rare disorder. Only severe cases are detected up to week 24 of pregnancy. There were no published examples in international literature of such a mild degree of disorder during the period of the case. Case (2) shows the non-recognition of a VACTERL-syndrome (complex syndrome of Vertebral, Anal, Cardiac, Trachea-Esophageal, Renal, and Limb defects). The *omissions regarding screening tests* occur in many cases (details see e.g., *supra* notes 31–34, 42, 49).

⁵² See *supra* note 38.

⁵³ In many cases, see *supra* notes 31, 49.

⁵⁴ In cases before RHCA of Budapest and that of Pécs.

⁵⁵ In cases before RHCA of Debrecen and that of Szeged.

⁵⁶ In cases before RHCA of Budapest and that of Győr.

⁵⁷ Case (1) shows that the age of the mother should not be taken into account in the Triple Marker Test result because it is already calculated by the computer algorithm (prohibition of double counting). Case (2) says that the serum AFP level and its

These failures may lead to further ones, which, e.g., result in an inaccurate treatment sheet⁵⁸ or in the breach of obligation to provide information. The lack of detection (or of observation or perception) due to inadequate screening can be the basis for further violations of rights, such as the failure to provide specific diagnostics⁵⁹ or prenatal treatment⁶⁰, or the late ordering of termination of pregnancy, i.e., induction of childbirth⁶¹ or of miscarriage.⁶²

4. Errors in targeted tests

As among the problems of screening tests, targeted genetic, brain, cardiac, etc. tests may be ordered or carried out with inadmissible delay⁶³ or such omission.⁶⁴ These may then give rise to further infringements, particularly in connection with providing information or performing additional targeted tests.

evolution are relevant in relation to both maternal and gestational age (published decision BDT2018. 3848). According to Case (3), the 39-year-old mother is expecting her third twin pregnancy.

⁵⁸ See an RHCA of Pécs case.

⁵⁹ Details see *supra* note 32, 34, 42.

⁶⁰ Details see *supra* note 34, 42, 50, 51.

⁶¹ See a twin pregnancies case before the RHCA of Budapest.

⁶² An RHCA of Budapest case.

⁶³ The mother's male sibling died at the age of six months (1988), and her female ancestors were genetically tested in 1991, which confirmed a paracentric inversion. The university that gave the medical opinion was not a party to the lawsuit, and its diagnosis was proven wrong nearly 20 years later. The mother was of an advanced age. The year of birth: 2009. At week 11, genetic counselling was done for suspected lymphangioma. Family history negative, record incomplete. The fetus was repeatedly found to have an abnormal nuchal fold thickness, so a Chorionic Villus Sampling was ordered, whereby a paracentric translocation of chromosome 4 was confirmed. This was later corrected to "pericentric inversion" by an unknown person (i.e., there was suspicion of misdiagnosis). Results of chorion biopsy: karyotype 46,XX. At week 19 (not week 16!) amniocentesis, F-PCR test yielded the same result as before. The G-banding analysis was unsuccessful. At week 37, an immature, severely retarded baby girl weighing 1480 g was born. Postnatal genetic testing (FISH and G-banding) confirmed reciprocal translocation, partial trisomy of chromosome 2, Wolf syndrome. The judgment of the Court of First Instance and the Court of Appeal dismissing the action was annulled by the Curia, which found that the defendant was liable to pay the full costs of bringing up the child. Condensed reasons see *supra* note 30.

⁶⁴ See some published cases such as BDT2018. 3848; EBH2015. P.11, and many others across the country.

5. Errors in the medical examiner's license

There have been several cases where the person carrying out the examination did not have the required examination qualification, certificate, or license, either because they are completely lacking or because they are of a lower grade than required.⁶⁵

6. Errors in measuring the likelihood of existence and detectability of a disorder

The court practice is not uniform as to *what percentage probability builds a "realistic" chance of detection* of a serious disability (APFL Article 6 (1) (b)) or a genetic or teratological harm (APFL Article 6 (3)) or a disorder incompatible with post-natal life (APFL Article 6 (4) (b)), the loss of which due to the doctor's or diagnostician's conduct results in liability, if these acted with the highest degree of care that can be legally expected, which means in the interpretation of courts that this care goes beyond the professional mandatory standards and even mere recommendations, if it seems to be necessary.⁶⁶ The determination of the mentioned percentage probability is a medical question of the trial, but the legal assessment thereof is a judicial task and discretion.⁶⁷ It is noteworthy that the judicial practice sometimes confuses the percentage probability of the *existence* of a genetic or teratological harm (APFL Article 6 (3)) with the percentage probability of *detectability* thereof. It is also remarkable that the court considers a 10% recognition ratio to be "realistic" in *loss of chance* cases.⁶⁸

⁶⁵ For the lack of FMF certificates see two cases before RHCA of Pécs and one before RHCA of Budapest.

⁶⁶ In two cases before RHCA of Pécs and another in Debrecen.

⁶⁷ A recently published decision of the Curia (No. BH2021. 168) reaffirms the long-standing practice by saying that the assessment of conduct according to the standard of care is not part of the facts, not a question of fact, but a legal conclusion drawn from the facts, a question of substantive law, which can be examined in the context of a breach of substantive law. The duty of care required of those involved in health care is therefore a legal category, and it is for the courts to decide whether it is met. However, depending on the circumstances of the case, special expertise not available to the court may be needed to establish or assess the facts or circumstances on which the decision is based.

⁶⁸ For example, the chance of detecting limb deficiency at ultrasound examinations at weeks 13 and 18 is 4-31%, which in Budapest and Debrecen justifies culpable negligence and liability, but not in Győr, since RHCA of Győr assesses that the chance of detection is too low to be considered as basis for an established responsibility. In

C. Trends in the compensation for pecuniary damages

The trends in the amount of pecuniary damage compensations can be summarized as follows. (Footnotes only show cases that may be considered extreme because of the amount, or the richness of the items claimed as damages.)

1. Differences between the practice of the courts

There is a divergence in the practice of RHCAs in following the decision of principle of the Curia No. EBH2015. P.11. The RHCA of Győr, for example, does not accept the possibility of awarding the full costs of upbringing because its justices consider this solution concern both constitutional and life protection issues. The RHCA of Pécs, a pioneer in screening the subject, follows the decision of principle not from inner conviction but because of the importance of guaranteeing legal certainty and predictability of judgments. A part of the justices of the RHCA of Budapest, and the justices of the RHCA of Debrecen *in toto* are convinced that the Curia's published decision of principle is correct, and therefore the justices thereof follow its approach. There also appears a discrepancy between the practice of some tribunals acting as courts of first instance and the practice of the competent courts of appeal (RHCAs). For example, some judicial panels of the Tribunal of Budapest do not follow the decision of principle No. EBH2015. P.11. because of concerns about life protection and constitutional issues, and therefore these judges grant merely the additional upbringing costs. However, their judgments are regularly altered (modified) or set aside by the RHCA of Budapest for rejecting the plaintiff's claims for the payment of the so-called "basic" upbringing costs, i.e., the difference between full and additional upbringing costs. In conclusion, it can be stated here that until the Curia issues a uniformity decision, a *spontaneous* unification of Hungarian court practice cannot be expected.

medical terms, it is extraordinary that Curia and the RHCA of Budapest say that even a 10% chance of detection is realistic. In fact, the problem proceeds *ad absurdum, scil.* the mild degree of caudal regression (cf. *supra* note 51, Case (a)), for which there were no published examples in the international medical literature at the time of the trial, was "proven" to be 10%, i.e., realistic. (However good sonographic conditions were demonstrably absent in the case at hand due to the mother's high abdominal wall thickness.)

2. Differences between action and judgment

Another interesting issue is the relationship between claims in action and final decisions. There is a slight trend (with few counterexamples) that claims are relatively rarely exaggerated, and the number of significantly overstated claims is extremely rare. It also seems to be a trend that, where courts depart from the claim at first or second instance, or where the first instance payment order is increased or reduced at second instance, it is not common for the change to be significant. There are, of course, counterexamples both downwards⁶⁹ and upwards, exceptionally five times the amount awarded. There are typically two reasons for such major changes. First, a change in granting *non-pecuniary* damages being based on judicial discretion is less common, especially in the case of major changes.⁷⁰ Second, larger changes regarding *pecuniary* damages may emerge due to the difference in granting full or merely additional upbringing costs. The pecuniary damages associated with raising a child to full age and thereafter caring for and supporting an incapacitated person for life is as diverse and multifarious as life itself. Sometimes the court, rather than using the bulk of invoices carefully set aside by the plaintiffs to determine and prove the amount claimed, treats many of the costs as common knowledge, especially the basic upbringing costs. The compensation of past and future expenses and loss of income through the payment of capital and interest or annuities also shows a varied picture, both in terms of the diversity of items and the amounts involved. The duration of annuities also adds detail to the picture. Two cases are typical, depending on the nature and severity of the disorder: granting annuity either only until the age of majority or without a final deadline.

⁶⁹ E.g., as pecuniary damage, the Tribunal of Pécs granted 74,000,000 HUF, which was reduced by the RHCA of Pécs to 54,000,000 HUF and was decreased again by Curia to 44,000,000 HUF. See Curia Pfv.III.20.955/2019. (Average gross earnings were monthly ca. 380,000–400.000 HUF in Hungary in 2021. However, an experienced and qualified obstetrician can earn three to five times this amount per month. The liability rests with the institution providing the health service as employer, doctors are directly liable exceptionally. The amounts of payment are shown only to give an idea of the size of the judgments.)

⁷⁰ E.g., the Tribunal of Szolnok granted for the plaintiffs as non-pecuniary damages altogether 3,000,000 HUF, the amount was elevated by RHCA of Szeged to 7,000,000 HUF, which was further raised by Curia to 33.000.000 HUF.

3. Circumstances affecting the compensation granted

The level of compensation is influenced by several factors, such as the severity, complexity, curability, treatability, maintainability of the disorder, the child's life prospects, premature death, the involvement of more than one child, twin pregnancy, the number of siblings and their health, the parents' lifestyle and their wealth and income, and the rate and change in all of these. There is also a paradigmatic difference in the harms for mother and father and for parent, grandparent, and sibling. Conclusions on averages and extremes of the totals are therefore fact specific. As such, these data alone are only instructive in the context of health service providers' loss calculations.

In the category of pecuniary damages, the *average amount of full upbringing costs and expired losses of income* is around 20,000,000 HUF, but it is not uncommon to find amounts approaching 50,000,000 HUF⁷¹, and sometimes the amount can be close to 100,000,000 HUF (not final)⁷² as well.⁷³ The *average amount of future income- and cost-replacement annuities* is 200,000 HUF per month. There are also limitless annuities, the amount of which exceed 500.000 HUF a month.⁷⁴

Compensation for non-pecuniary damage is not addressed in this article. I would only point out that the father typically receives half of the damages awarded to the mother and the siblings a quarter thereof.⁷⁵ There are, of course, exceptions.⁷⁶

A recent case⁷⁷ raises many instructive questions. The court has finally awarded a large amount of income-replacement annuity of 720,000 HUF per month with no time limit. The question is whether it is acceptable, in the context of the *full* costs of bringing up a child born with a severe disability, to grant such a great amount of annuity without a time limit for a mother with several diplomas being at the beginning of her career for the reason that she has "lost" it (more exactly: may have lost it) because of the birth and care of the disabled child. Namely, it is debatable and clearly uncertain for how long she would remain in the career in question (career leaving, death, illness, retirement), how long she would remain in the specific post she had to leave or could not start,

⁷¹ In cases emerged in Budapest and Pécs.

⁷² In a case decided by RHCA of Budapest and the Curia.

⁷³ The amount of average gross earnings and that of an experienced and qualified obstetrician in Hungary see *supra* note 69.

⁷⁴ In two Budapest cases.

⁷⁵ In cases before the RHCA of Budapest / Pécs / Győr / Debrecen.

⁷⁶ In many cases decided by the RHCA of Budapest.

⁷⁷ See an RHCA of Budapest case.

what the likelihood of her promotion could be. These factors are unpredictable for a number of unforeseeable reasons in the interest of both the employer and employee. Furthermore, the question is how to assess the amount of the typical categories of full upbringing costs for families in different income situations when it is objectively uncertain whether the expenses actually incurred up to the time of the judgment would be covered in the future by the family's wealth and income situation, e.g., due to the premature death of the spouse with the higher income or regarding the possibility of the parents' divorce. And conversely, what if income conditions change significantly more favorably than expected for whatever reason? These are typical questions in such lawsuits.

VIII. RECOMMENDATIONS

A legislative amendment is needed in Article 6 (3) of APFL: The broad concept of genetic and teratological harm should be restricted by the adjective "serious". This would also better balance the issue of an abortion indication by the health care provider and the consequent lawsuits for damages for failure to do so (cf. *supra*, Introduction).

Subsequently, the content of the following legal definitions should be standardized by the competent medical association or professional body, and it should also be revised from time to time to reflect the current state of scientific knowledge (diagnostics, prenatal and perinatal care, surgery, *etc.*):

- "Serious genetic harm" / "serious teratological harm" (Article 6 (3) of APFL),
- "Medically probable severe disability or other impairment" (Article 6 (1) (b) of APFL),
- "A disorder incompatible with the life of the fetus after birth" (Article 6 (4) (b) of APFL),
- "A developmental disorder resulting in a medically probable inability to live" and "an impairment that is compatible with life but causes a severe and incurable disability" (Article 185 (1) - (3) of AHC).

The next question is which association or body should carry out this activity of issuing professional standards, opinions or recommendations. It is also a question of whether the position of the panel could have a direct impact on the practice of forensic medical examiners in providing expert opinions and thus an indirect impact on judicial practice. Finally, there is also the question of the binding force of the body's position, whether it should allow derogations to the addressees and, if so, in which cases and under what conditions.

The following solution also seems reasonable in terms of liability exemption. Every case is unique and every human being, its conception, pregnancy, and birth is different. Accordingly, the attending medical practitioner or a person as defined in APFL should formulate the professional opinion on a case-by-case basis, in the knowledge of which the pregnant woman who has been informed of it in a professional and humane manner can exercise her right to self-determination and the parents can exercise their right to family planning. This individual, case-by-case medical opinion could deviate from the guidelines, opinions, recommendations, standards (or whatever) of mandatory or non-mandatory character to be drawn up by the national panel designated as the competent body. However, the casual derogation from the body's guideline would be subject to the condition that the doctor's opinion in the individual case on the termination of pregnancy be justified in writing in a detailed and data-rich manner, supported by sonographic records. The existence of an *ex-post* justification requirement would have a positive impact on the compliance of health care providers, as it would require a sufficient quantity and quality of tests to be carried out throughout the care, sufficient detail to be extracted from these tests and the data to be properly recorded, so that any justification to be provided *ex-post* could be properly supported. This would at least partially prevent the main errors and problems in information, screening, and specialized diagnostics, as the lawsuits have shown.

It is advisable, in addition to ensuring that medical standards and recommendations are observed as far as possible, to adopt a legal concept of due diligence that sets a higher standard than these – in terms of diagnosis, information and screening or targeted diagnostic tests and interventions – to the point where this higher standard of diligence does not jeopardize the care provided by a health service that is also short of staff, resources and time.⁷⁸ In certain aspects, demonstrating the level of due diligence that can be deduced from judicial practice is sometimes objectively insoluble, or may present the doctor with a task that, in the light of the rational considerations of the moment, does not appear to be solvable.⁷⁹

⁷⁸ Cf. published decision of principle of the Curia No. EBH2010. 2229, see *supra* note 6.

⁷⁹ Cf. published RHCA-decision No. BDT2016. 3595: "I. The hospital must organize health care in such a way as to ensure that the patient has access to appropriate and continuously available health care that is justified by the patient's state of health and that meets the requirement of equal treatment. II. The level of legally expected way of conduct is independent of the personal and material conditions available for the treatment of the patient at the time. The reference to the material and personal conditions, e.g., of a weekend care is not in itself an exemption to liability for dam-

However, finding the optimal balance between legal requirements and actual possibilities will continue to depend on the wisdom, commitment, professionalism, humanity and ultimately, sometimes: the stamina of the doctor. The court is not legally empowered to apply the law equitably (i.e., there is strict law) to defendants and interveners (i.e., insurance companies) in such cases, and therefore, in the event of a failure to comply with the truly strict duty of care, which is difficult to exempt, liability may be imposed, and can only be reduced if the plaintiff itself was at fault. However, this is only very rarely the case.

Despite the technical, material, time, and organizational difficulties, it would be advisable to introduce the recording of the entire course of all sonographic examinations of all pregnant mothers on a data medium.⁸⁰ In this case, all the omissions, and lack thereof as well (!), and also the context of the events would be clear before the court, and the serious failure of the health service providers would not depend on a mere failure of proof, but solely on the conduct that was actually contrary to law (i.e., Article 339 (1) of OHCC, or that of Articles 1:4 (1) and 6:519 of NHCC and Article 77 (3) of AHC⁸¹). All of this requires a significant additional investment in human, material, and equipment resources. Hopefully, the government will recognize and support this!

IX. A SURPRISING EPILOGUE

As an afterword, I would like to put three quasi rhetorical questions about the presumed effects of very large sums of money adjudicated as compensations for damage.

- First, it is a question of whether these adjudications have an impact on the practice of issuing an indication for termination of pregnancy. If the answer is yes, the constitutional purpose of the APFL formulated in the Preamble⁸² thereof could be reversed by the interplay and interactions

age." See further BH2013. 150, *supra* note 6.

⁸⁰ It happened that during the trial, the expert stated that the disorder was detectable. The treatment sheet was untrue, because although the examination was not recorded, the father himself filmed the ultrasound screening test events on the monitor by his own telephone. The expert in the trial established from this record that the disorder was detectable. See RHCA of Pécs Pf.III.20.016/2017.

⁸¹ Cf. *supra*, Introduction, I.C.

⁸² Preamble of APFL says: "The Parliament, aware that fetal life, which begins at conception, deserves respect and protection; that the protection of fetal life can be achieved through increased care for expectant women, while at the same time the creation of conditions for the healthy development of the fetus is primarily the responsibility of parents; that abortion is not a means of family planning and birth

of parents, medicine, and lawmaking, which is both humanly and professionally understandable.

- Secondly, there is the question of whether the social benefits of such large compensation payments for damages outweigh their negative impacts on the overall patient population's health care services since these can significantly reduce health service institutions' budgets (insurance covers are generally weak).
- Thirdly, it is questionable whether this risk of compensation for damages can lead to an increase in the professional level and humane standard of medical care, especially given that these issues are also determined by many external factors such as budget, equipment, staff, workload, time factor.

In addition to legal certainty, there are other aspects of the unification of judicial practice that are not easily reconciled: Such as the aspects of life protection of fetuses and easing the financial burden of families in tragic situations. The emphasis is, as usual, on proportions: The level of compensation can be counter-productive because, on the one hand, it can encourage litigation for the full costs of upbringing the disabled child, and on the other hand, it can also somehow encourage the issuing of abortion indications in doubtful situations.

ADDENDUM:

How can this epilogue finally surprise both reader and author? In July 2022, long after my manuscript was submitted and accepted, the Curia considered it necessary to finally close the debate by accepting a constitutionally binding Uniformity Decision. The Uniformity Decision No. 2/2022. JEH published on 10 October 2022 reads:

“If the liability for damages of the health care provider can be established because the mother could not exercise her right to terminate the pregnancy due to the lack of or incorrect medical information on the genetic or teratological harm of the fetus during the prenatal care, the parents can claim compensation for the additional but not the full child-upbringing costs incurred in connection with the named fetal origin health impairment of the child born.”

control; that family planning is the right and responsibility of parents, hereby enacts the following law.”

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Sažetak

József Benke*

**“JE LI ME TREBALO IZ UTROBE U GROB STAVITI?”
SUDSKA PRAKSA U DOSUĐIVANJU NAKNADE
ŠTETE ZA ROĐENJE DJETETA S GENETSKIM ILI
TERATOLOŠKIM OŠTEĆENJEM U MAĐARSKOJ I
NJEZIN MOGUĆI UČINAK NA MEDICINSKU PRAKSU**

Značenje medicinskog pojma fetalnog genetskog ili teratološkog oštećenja, ili poremećaja koji onemogućuje postnatalni život, a što je zakonski uvjet za ostvarenje prava na prekid trudnoće, dopuštenog do 20./24.-og tjedna trudnoće ili bez vremenskog ograničenja u Mađarskoj, mijenja se uporedo s razvojem medicinske znanosti i dijagnostike. O ovom temeljnom pitanju za čitavo društvo moraju promišljati kako medicinska tijela, zakonodavac i sudovi pa tako i obitelji. U radu se iznose zaključci i preporuke na temelju rezultata analize prakse Vrhovnog suda (Kúria) i područnih visokih žalbenih sudova u razdoblju od 2015. do 2021. godine. Naknada štete roditeljima dosuđivana je ili u punom iznosu troškova podizanja djeteta rođenog s neprepoznatim genetskim ili teratološkim oštećenjem ili pak u iznosu koji je odgovarao tek dodatnim troškovima povezanim s prirodno nastalim oštećenjima. Ovo istraživanje, koje je obuhvatilo ukupnu domaću sudsku praksu, pokazuje raspon iznosa dosuđene naknade štete i vrste pogrešaka, odnosno štetnih radnji počinjenih pri dijagnozi, informiranju, pregledima, ciljanim testovima, licenciranju i određivanju vjerojatnosti poremećaja. Usprkos usredotočenosti na nacionalnu praksu, u članku se ukazuje na korelacije koje mogu biti od koristi na međunarodnoj razini u predmetima za naknadu štete vezanima uz rođenje djeteta s urođenim oštećenjima, a u smislu pretpostavljenog učinka visokih iznosa naknade štete na mogući porast medicinskih indikacija za prekid trudnoće.

Ključne riječi: novčana naknada štete; fetalna dijagnostika; genetska i teratološka oštećenja fetusa; učinci građanskopravne sudske prakse na medicinsku praksu; nesavjesno liječenje

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